No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER ON REARGUMENT

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QUESTION PRESENTED

Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in Runyon v. McCrary, 427 U.S. 160 (1976), should be reconsidered?

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CITATIONS TO OPINIONS BELOW

Petitioner incorporates by reference the citations to opinions below set out in her Brief on the Merits.

JURISDICTION

Petitioner incorporates by reference the section on

jurisdiction set out in her Brief on the Merits.

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioner incorporates by reference the statement of the case set out in her Brief on the Merits.

SUMMARY OF ARGUMENT

I. Both § 1981 and § 1982 derive from the Civil Rights Act of 1866. When the actual Revisers' Note for the 1874 codification is examined, it is clear that the Congress did not intend to repeal that part of the 1866 Act that contained what is now § 1981 and that, to the contrary, the Revisers cited judicial interpretations of the 1866 Act.

II. When Congress passed the Civil Rights Act of 1866 it was concerned with, and intended to prohibit, all actions both public and private that might lead to the effective reintroduction of slavery or peonage. Congress was aware of various schemes and devices of private parties to deny blacks the equal right to contract with regard to their labor. Therefore, § 1981 had as a central purpose the guaranteeing of the right to contract free of racial discrimination by private persons.

III. Congress has both ratified and adopted this Court's

holding that §§ 1981 and 1982 prohibit discrimination by private parties. When it passed the Civil Rights Act of 1964, the Fair Housing Act of 1968, and the Equal Employment Opportunities Act of 1972, Congress rejected repeated attempts to eliminate the Reconstruction statutes as alternative remedies for private discrimination. When it passed the Civil Rights Attorneys' Fees Act of 1976, Congress endorsed this Court's decisions in Johnson v. Railway Express Agency and McDonald v. Santa Fe, and amended a companion statute for the specific purpose of permitting the recovery of attorneys' fees in cases against private as well as public defendants brought under §§ 1981 and 1982.

IV. The doctrine of stare decisis militates against the overruling of Runyon and McDonald. None of the factors that would lead to ignoring the doctrine apply in this case. To the contrary, since Runyon and its progeny involve statutory construction and since it is clear that

Congress approves that construction, those same factors are overwhelmingly in favor of adhering to the doctrine in this case and letting the decision in Runyon stand.

ARGUMENT

I.

SECTION 1981, AS WELL AS § 1982, DERIVES FROM § 1 OF THE 1866 CIVIL RIGHTS ACT

In Jones v. Mayer Co., 392 U.S. 409 (1968), the Court held that 42 U.S.C. § 1982 extends to wholly private discrimination. The Jones ruling was based on the legislative history of § 1 of the Civil Rights Act of 1866, from which § 1982 is derived. In Runyon v. McCrary, 427 U.S. 160, 169 & n.8 (1976), the Court held that § 1981, as well as 1982, derives from § 1 of the Civil Rights Act of 1866. The dissenting opinion in Runyon urged that § 1981 derives solely from § 16 of the Voting Rights Act of 1870.

Section 1 of the 1866 Act was explicitly reenacted as § 18 of the Voting Rights Act of 1870, which also included, in § 16, other language similar to § 1 of the 1866 Act. In 1874, all then-existing federal laws were incorporated by Congress into a Revised Code. Sections 1981 and 1982 are identical to §§ 1977 and 1978, respectively, of the Revised Code of 1874. According to the Rogers dissent, a significant part of § 1 of the 1866 Act, as reenacted by § 18 of the 1870 Act, simply disappeared when the Revised Code was enacted in 1874. The dissent in Rogers was premised on the assumption that when Congress in 1874 enacted the predecessor of § 1981, § 1977 of the Revised Code of 1874, it had before it and relied on a 'Revisers' unambiguous note that the section derived solely from' § 16 of the Voting Rights Act of 1870. 427 U.S. at 195 n.6. This assumption regarding the content of the revisers' notes was incorrect.

The dissenting opinion in Rogers apparently relied

upon the note printed alongside § 1977 (§ 1981) in the 1874 Revised Code. That note reads:

Equal rights under the law.

31 May, 1870, c. 114,

S. 16, v. 16, p. 144[1]

This is, indeed, a reference only to the Voting Rights Act of 1870, but the notes printed in the Code of 1874 were not those written by the revisers themselves. Rather, the annotations found in the printed Revised Code of 1874 were actually written and published after the passage of the law itself, pursuant to a contract between the Secretary of State and the publishing firm of Little, Brown and Company.[2] It is unclear whether the notes in question were prepared at the direction of the Secretary or by an employee of the publisher.

The revision of the federal statutes was originally

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[1] Revised Code of 1874, p. 348 (1877).

[2] See 18 Stat. 113 (1874).

authorized by an 1866 law which created a commission for that purpose. The Commissioners were authorized not only to compile existing law, but to make "such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." 16 Stat. 74-75. The Commissioners were directed to point Congress to the derivation of each provision in two ways, referring either to "the original text from which each section is compiled" or "to the decisions of the federal courts, explaining or expounding same." Id. at 75. When in 1872 the Commissioners presented their report to Congress, the inclusion in their draft of "alterations" in the law -- although originally authorized by the 1866 statute -- proved to be a legislative nightmare. Congress quickly concluded that it would be "utterly impossible to carry the measure" if it were understood to contain any alterations whatever in existing law. 2 Cong. Rec. 646 (1874).

Accordingly a second reviser, Thomas Jefferson Durant, was engaged to prepare a new draft. Durant was instructed to compare the Commissioners' draft with the original laws enacted by Congress, and to undo any alterations in existing law that had been made by the Commissioners. 2 Cong. Rec. 646-650 (1874); see 17 Stat. 579. Durant's draft and report were presented to Congress in 1873.

The Commissioners' 1872 note to § 1977, unlike the Revised Code annotation, is not limited to the 1870 Voting Rights Act. The Commissioners' note reads:

Equal rights under the law

31 May, 1870 - ch. 114,

§ 16, vol. 16, p. 144

1 Abb. U.S. 28, 84, 588[3]

The last line refers to three lower court opinions printed

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3 Revision of the United States Statutes as Drafted by the Commissioners Appointed for That Purpose, v. I, p. 85 (1872) (Library of Congress No. "KF 50.U5").

in Abbott's Reports. Two of these opinions "explain and expound," not the 1870 Voting Rights Act, but § 1 of the Civil Rights Act of 1866. Matter of Turner, 24 Fed. Cas. 337, 1 Abb. 84 (1867); United States v. Rhodes, 27 Fed. Cas. 785, 1 Abb. 28 (1866).[4] Insofar as Congress relied on the Commissioners' notes to determine the source of section 1977, it would necessarily have concluded that that section derived both from the 1866 Civil Rights Act and the 1870 Voting Rights Act.

Durant's 1873 report would undoubtedly have led Congress to the same conclusion. Durant's draft of the revised code did not include any side notes regarding the

[4] Turner is of particular interest because it was a civil action brought against a private white employer by a black apprentice; the apprentice complained that the employer had violated her rights under § 1 by failing to include in her contract of indenture various provisions required by state law in the case of a white apprentice, such as a guarantee that the apprentice would be taught to read. Chief Justice Chase, sitting as circuit justice, concluded that "the indenture ... is ... in contravention of ... the first section of the civil rights law enacted by Congress on April 9, 1866." 24 Fed. Cas. at 339.

derivation of particular provisions.[5] Durant's silence as to the particular origin of § 1977 could not have led Congress to believe that that section of his draft was a tacit repeal of part of the 1866 Act. Durant's introduction to his draft expressly assured Congress that no such repeals were worked by his draft:

> Every section reported by the commissioners has been compared with the text of the corresponding act or portion of the act of Congress referred to, and wherever it has been found that a section contained any departure from the meaning of Congress as expressed in the Statutes at Large, such change has been made as was necessary to restore the original signification.[6]

Durant's assurance that his version of the revised code would result in no change in the law was constantly reiterated by the sponsors of the bill, and was clearly

[5] Untitled Report, Library of Congress No. "Law U.S. 2, I.L.R.S." (rare book room), p. 432.

[6] Report of Thomas Jefferson Durant to the Joint Committee on the Progress of Work Revising the Statutes of the United States, p. 1 (Library of Congress No. "Americana 7," Durant (rare book room)).

critical to its passage.[7]

That assurance was specifically reiterated on the floor of the House with regard to the civil rights provisions of the revised code. Representative Lawrence advised his colleagues that the bill was framed to

> brin[g] "together all statutes and parts of statutes which from similarity of subject ought to be brought together"... The plan ... is to collate in one title of 'civil rights' the statutes which declare them.[8]

Lawrence then referred the House to the specific provisions of the 1866 Civil Rights Act and 1870 Voting Rights Act. He read into the record the language of § 1 of the 1866 Act, and commented that § 16 of the 1870 Act "re-enacts in modified words the substance of the

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[7] 2 Cong. Rec. 647 (Rep. Dawes; "What we want is to reproduce the law as it is") (Rep. Poland; bill is "free from any effort to change existing law"), 648 (Rep. Poland; bill is "a reflex of existing statutes") (Rep. Hoar; bill will "widely existing laws, and nothing more ... there is no change in the existing law;" bill "does not change existing law ... even though the difference be only ... the difference between comma and a semicolon"), 649 (Rep. Hoar; bill "contains no alteration of the law").

[8] 2 Cong. Rec. 81[illegible] (emphasis added).

original civil-rights section."[9] He then assured Congress that "in the reported draft of the commissioners, as in Durant's revision, the act of May 31, 1870, is very properly not treated as a revision of the whole subject, and hence as superseding the entire original act."[10] Lawrence pointed to the treatment of civil rights as a "fair specimen" of Durant's work in codifying without altering the law, and insisted "from these all can judge of the accuracy of the translation."[11] Viewed in light of these circumstances, because § 1 of the 1866 Civil Rights Act extends to private acts of discrimination, § 1981 does so as well.

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[9] Id.

[10] Id. at 828 (emphasis added).

[11] Id.

II.

CONGRESS INTENDED SECTION 1 OF THE CIVIL RIGHTS ACT OF 1866 TO BAR ALL RACIAL DISCRIMINATION, BOTH PUBLIC AND PRIVATE

The actions of Congress in enacting §§ 1981 and 1982 must be examined in light of the historical conditions in 1866, at the close of a bloody conflict fought to end slavery. When viewed in its entirety, the legislative history of what was to become §§ 1981 and 1982 makes it clear that Congress was attempting to pass comprehensive legislation that would outlaw all forms of discrimination or other attempts to subjugate the former slaves, whatever the source of those attempts. Some actions that these provisions sought to interdict were the official acts of various states. Many other actions, which Congress was equally intent upon prohibiting, were those of private parties who were seeking to reintroduce slavery by every means available to them.

A. In the Area of Contract and Property Rights, the Problems that Congress Intended to Remedy Were Largely Caused by Private Action.

When Congress first reconvened after the end of the Civil War, the facts concerning conditions in the southern states, particularly the treatment of the freedmen, were in dispute. By this time, major differences were beginning to emerge between President Johnson and many of the Republican leaders in Congress. In this climate, Congress made efforts to determine for itself the truth concerning the condition of freedmen. The information thus obtained – from the Schurz Report, the hearings of the Joint Committee on Reconstruction and letters and petitions addressed to Congress – identified the problems that the Civil Rights Act of 1866 was designed to remedy. Examination of the information upon which Congress acted demonstrates that, with regard to contract and property rights, the primary difficulties facing freedmen stemmed from the actions of private

individuals, not state legislatures and officials.

1. The Schurz, Howard and Grant Reports.

a. The Schurz Report. The pivotal event in the origin of congressional reconstruction policy, and in the drafting by Senator Trumbull of the 1866 Civil Rights Act, was the report of Major General Carl Schurz on conditions in the South following the end of the war.[12] In June of 1865, "President Johnson assigned Schurz the task of traveling through a number of Southern States for the purpose of gathering information and making observations as to the postwar conditions to be found in that region." Memphis v. Greene, 451 U.S. 100, 131 n.4 (1981) (White, J., concurring). In November 1865 Schurz completed his report, but President Johnson declined to release the report until the Senate adopted a resolution

[12] Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi and Louisiana, S. Exec. Doc. No. 2, 39th Cong., 1st Sess.

insisting that it be made public.[13]

When the Schurz report was finally released to the Senate on December 19, 1865, Senator Sumner demanded that the entire report be read aloud on the floor, denouncing as a "white-wash" President Johnson's benign account of conditions in the South. Cong. Globe, 39th Cong., 1st Sess. 79. After the introductory paragraphs of the Schurz report had been read as requested, Senator Trumbell urged the Senate to defer further debate on the accuracy of the President's representations until the Senate had had sufficient time to read and understand the Schurz report itself, and joined in a motion to direct that the entire report be printed.[14]

Congress recessed for the holiday on December 21,

[13] Cong. Globe, 39th Cong., 1st Sess. 30, 78. See J. James, The Framing of the Fourteenth Amendment 19 (1956).

[14] Id. at 80. Senator Sherman, in successfully urging that the Schurz report be printed, argued: "I have no doubt whatever that the report of General Schurz is a very able, elaborate, and excellent document; I have no doubt we shall be advised and informed when we read it...." Id. at 79.

but the Schurz report, having finally been released, played a key role in shaping public opinion.[15] To assure that the Schurz Report was widely disseminated and read, Congress ordered the printing of 10,000 additional copies.[16]

General Schurz' grim account of conditions in the South stood in stark contrast with the benign description that had been offered by President Johnson. Schurz reported that southern whites, far from accepting the victory of the union forces and the emancipation proclamation, were almost universally determined to reintroduce some form of slavery, and had already taken a variety of steps to achieve that end. In discussions with Schurz, white southerners insisted:

> [i]n at least nineteen cases of twenty ... "you cannot make the negro work without physical compulsion." I heard this hundreds of times, heard it wherever I went, heard it in nearly the same words from so

[15] J. James, at 50-51.

[16] Cong. Globe, 39th Cong., 1st Sess. 265.

> many different people that at last I came to the conclusion that this is the prevailing sentiment among the southern people.

S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 16. That "widely spread ... and ... deeply rooted" prejudice

> naturally produced a desire to preserve slavery in its original form as much and as long as possible ... or to introduce into the new system that element of physical compulsion that would make the negro work.

Id. at 17. That attitude was compounded by a general belief among whites that "the negro exists for the special object of raising cotton, rice and sugar for the whites, and that it is illegitimate for him to indulge, like other people, in the pursuit of his own happiness in his own way." Id. at 21 (emphasis in original). In the absence of federal intervention, Schurz warned, those two beliefs

> will tend to produce a system of coercion, the enforcement of which will be aided by the hostile feeling against the negro now prevailing among the whites, and by the general spirit of violence which in the south was fostered by the influence slavery exercised upon the popular character.

Id. at 32. The former slave owners, Schurz predicted in an italicized passage, would devise schemes for the reintroduction of practical slavery, "the introduction of which will be attempted." Id. (emphasis in original).

There was, of course, no practical reason why the coercion and slavery-like working conditions favored by whites could be imposed only through legislation or actions by state officials. Schurz reported that widespread efforts to re-enslave the freedmen were being made by private citizens. The majority opinion in Jones v. Mayer Co. noted that the Schurz report referred to lawless acts of brutality directed against blacks. 392 U.S. at 428-29. These were not random acts of racially motivated violence but, according to Schurz, an effort to prevent blacks from exercising the rights of freedmen:

> In many instances negroes who walked away from plantations ... were shot or otherwise severely punished, which was calculated to produce the impression among those remaining with their masters that an attempt to escape from slavery would result in certain destruction. A large

> proportion of the many acts of violence committed is undoubtedly attributable to this motive.

S. Exec. Doc. No. 2, at 17. For example, General Swayne, the Freedmen's Bureau assistant commissioner in Alabama, reported

> The bewildered and terrified freedmen know not what to do -- to leave is death; to remain is to suffer the increased burden imposed upon them by the cruel taskmaster, whose only interest is their labor, wrung from them by every device an inhuman ingenuity can devise; hence the lash and murder is resorted to intimidate those whom fear of an awful death alone cause to remain, while patrols, negro dogs and spies, disguised as Yankees, keep constant guard over these unfortunate people.

Id.[9] See also id. at 18 (Georgia), 19 (Mississippi).

Whether former slaves remained with their old masters or succeeded in finding work with another land owner, they were likely to be subject to abuse by their employers, who often imposed on them conditions as bad or even worse than slavery itself.

> [M]any attempts were made to ... adher[e], as to the treatment of laborers, as much as possible to the traditions of the old system, even where the relations between employers and laborers had been

> fixed by contract. The practice of corporal punishment was still continued to a great extent.... The habit is so inveterate with a great many persons as to render on the least provocation, the impulse to whip a negro almost irresistible.

Id. at 19-20. A black worker might be disciplined for insolence or insubordination "whenever his conduct varie[d] in any manner from what a southern man was accustomed to when slavery existed." Id. at 31. Wages were often paltry:

> I have heard a good many freedmen complain that, taking all things into consideration, they really did not know what they were working for except food, which in many instances was bad and scanty; and such complaints were frequently well founded.

Id. at 29. Where blacks worked as sharecroppers, their portion of the plantation's crop was at times "so small as to leave them in the end very little or nothing." Id. Where the contracts agreed to by the land owners contained fair terms, the employers frequently broke them. Id. at 16, 30.

General Schurz found that plantation owners

specifically attempted to use labor contracts as a method to reintroduce slavery:

> [M]any ingenious heads set about to solve the problem, how to make free labor compulsory .... [S]ome South Carolina planters tried to solve this problem by introducing into the contracts provisions leaving only a small share of the crops to the freedmen, subject to all sorts of constructive charges, and then binding them to work off the indebtedness they might incur. It being to a great extent in the power of the employer to keep the laborer in debt to him, the employer might thus obtain a permanent hold upon the person of the laborer.

Id. at 22 (emphasis added). Thus, the former masters were generally willing and even anxious to enter into contracts with their former slaves; it was the freedmen who were wary, "afraid lest in signing a paper they sign away their freedom." Id. at 30; see also id. at 27.

Although he was apprehensive that legislation would be enacted to facilitate the return of de facto slavery, id. at 35, the actual abuses of freedmen which Schurz described were almost exclusively private in

nature. At the time he drafted the report, the only post-war laws of which Schurz was aware that had an adverse effect on blacks were scattered local ordinances in Louisiana and Mississippi, measures which Schurz acknowledged were as of yet "mere isolated cases." Id. at 25.

This was the preeminent account of conditions in the South when Senator Trumbull drafted and introduced the Civil Rights Bill. As late as December 13, Trumbull professed uncertainty as to whether the situation in the former slave states required federal legislation. Cong. Globe, 39th Cong., 1st Sess. 43. On December 19, when the Schurz report was released, Trumbull admonished the Senate to defer any judgments until the report was read. Id. at 80. Seventeen days later, on January 5, 1866, Senator Trumbull, now convinced that congressional action was indeed necessary, introduced S. 61, the bill that was to become the Civil Rights Act of 1866. It is

difficult to believe that Trumbull, acting against the background of the Schurz report, would have intended under S. 61 to permit continuation of the forms of private abuse already then in existence, and to extend federal protection only to certain types of potential, and somewhat hypothetical, statutory problems.

b. The Howard Report. General Howard's account of conditions in the South was contained in his summary of work of the Freedmen's Bureau, which he directed. According to Howard, the greatest actual difficulties encountered by the Bureau were with abusive or dishonest employers. Reports from South Carolina, for example, were "replete with instances of ... cruelty towards the freedmen -- whipping, tying up by the thumbs, defrauding of wages, over-working, combining for purposes of extortion." H. Exec. Doc. No. 11, 39th Cong., 1st Sess. 26 (1866). In Louisiana whites were often unwilling "to fulfill their contracts with the

freedmen." Id. at 28. The critical problem in Mississippi, as in "many of the other States," was to induce the land owners "to treat [freedmen] kindly, respect their rights, and pay them promptly, as agreed upon in the contract." Id. at 30. Howard's circular orders to his subordinates, annexed to his report, reflected a preoccupation with these problems.[17] Id.

Howard's report made no mention of any problems created for freedmen by post-war southern legislation, instead noting with approval the action of several states authorizing blacks to testify in their courts. Id. at 29 (Louisiana and Alabama). Howard warned that federal protection was required because of private attitudes towards and treatment of freedmen: "[T]here is danger of the [state] statute law being in advance of public

[17] For example, Circular No. 5 directed: "Negroes must be free to choose their own employers, and be paid for their labor. Agreements should be free, bona fide acts, approved by proper officers, and their inviolability enforced on both parties. The old system of overseers, tending to compulsory unpaid labor and acts of cruelty and oppression is prohibited." Id. at 45. See also id. at 49.

sentiment, so that where there is the most liberality, ill consequences would be likely to result if [federal] government protection should be immediately withdrawn." Id. at 32-33.

c. The Grant Report. General Grant, commenting in a letter requested by President Johnson, envisioned a need for a federal role in protecting the freedmen, particularly from abuses by "ignorant men":

> It cannot be expected that the opinions held by men at the south for years can be changed in a day, and therefore the freedmen require for a few years ... laws to protect them....

Cong. Globe, 39th Cong., 1st Sess. 78. Grant's only reference to southern legislation was a suggestion that it would ultimately provide whatever protection blacks might require.

2. Hearings of the Joint Committee on Reconstruction.

Trumbull's Civil Rights Bill was referred to the

Judiciary Committee on January 5; the Committee reported the bill to the Senate a week later without conducting any hearings on the legislation. Cong. Globe, 39th Cong., 1st Sess. 211. The investigation of actual conditions in the South had been consigned by Congress to a special Joint Committee on Reconstruction. See id. at 24-30, 47, 57, 60-62, 69. The hearings of the Joint Committee began on January 22, and continued throughout the congressional consideration of S. 61. The ongoing revelations produced by the Joint Committee hearings supplemented the earlier reports of Generals Schurz, Howard and Grant in providing the factual foundation of congressional reconstruction policy.[18]

The Joint Committee hearings painted a detailed

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[18] Transcripts of the hearings were available to and mentioned by members of the House during the first debate on the Civil Rights Act. Cong. Globe, 39th Cong., 1st Sess. 1267. During the period between initial passage and the vote to override the President's veto, Congress directed that several thousand copies of the hearings be printed. Id. at 1407-1413.

and often grim picture of the serious difficulties then faced by the freedmen, and of the potential significance of pending legislation such as S. 61. Some forms of discrimination forbidden by § 1 of the bill proved to be of little immediate importance; in 776 pages of testimony there are less than half a dozen complaints regarding any inability of freedmen to sue or testify, or the imposition of unequal penalties.[19] The overwhelming majority of the testimony concerning blacks was concerned with three problems -- the inability of blacks to make labor contracts on fair, non-discriminatory terms, the inability of blacks to buy, lease or hold real or personal property, and the failure of local officials to enforce state criminal laws where the victim of an offense was a freedman. All of the testimony regarding labor contract problems, and virtually all the testimony regarding real and personal

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[19] Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., pt. iii, p. 8 (excessive penalties), 37 (testimony); pt. iv, p. 50 (right to sue and be sued), 75 (excessive penalties) (1866).

property, concerned abuses by private parties, rather than discriminatory officials or laws.

There were numerous reports of violence being used to prevent former slaves from exercising the right to make employment contracts. In Mississippi an organization known as the "black cavalry" forcibly returned to their old masters freedmen who obtained jobs elsewhere:

> [F]reedmen [who] have gone from one county to another and made contracts, ... were brought back by men with their faces blackened, who whipped them and ordered them not to leave again ... even though they were under no contract with their former masters.[20]

Similar organized patrols, which attacked any blacks found on the roads without written permission from their employers, were reported in Alabama, South Carolina, and Louisiana.[21] White employers themselves often

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[20] Id. at pt. iii, p. 143; see also id. at pt. iii, p. 145.

[21] Id. at pt. ii, p. 222; pt. iii, p. 8; pt. iv, pp. 77, 83.

attacked or killed former slaves if they attempted to quit and seek jobs elsewhere.[22]

Freedmen who succeeded in leaving their old masters had little chance of contracting to sell their services on fair, non-discriminatory terms. White land owners, still attached to the slave system in which blacks had worked without compensation, were almost universally unwilling to pay blacks the wages commanded by whites, or the sums for which black slaves, as property, had been rented by their owners prior to the Civil War. Clara Barton and others reported that many former slave owners objected to paying blacks any wages whatever, and were intent upon withholding all compensation once the union army and Freedmen's Bureau were withdrawn from the South.[23] Even under

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[22] Id. at pt. ii, pp. 187, 188; pt. iii, p. 42; pt. iv, pp. 39, 65, 66, 125.

[23] Id. at pt. ii, pp. 30, 51, 52, 175; pt. iii, pp. 10, 103 (statement of Clara Barton); pt. iv, pp. 37, 46.

pressure from federal officials, most planters balked at paying blacks more than $8 a month, and often insisted on paying even less, only a fraction of the rate at which slaves had been hired out prior to the war.[24] In the case of sharecropping, although a share of one-third or one-half of the crop was generally regarded as the fair rate, land owners were often willing to offer blacks only one-sixth or one-tenth.[25]

Most land owners were entirely willing to contract with blacks, providing their onerous terms were accepted; among former slave owners contracts were regarded as a device by which some form of practical slavery could be

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[24] Id. at pt. I, p. 108 (*unfair rates*); pt. ii, pp. 13 ($8 a month), 54 ($3-7 a month), 55 ($6 a month), 210 (*unfair rates*), 226, 227 (*unjust rates*), 234 ($2 a month); pt. iii, pp. 6 ($7 a month), 12 ($2 a month), 41 ($8-12 a month), 43, 44, 46 (*unfair rates*), 143 ($7-10 a month), 150 ($8-12 a month); pt. iv, p. 116 ($8 a month). Prior to the Civil War a slave was typically rented out at a rate of $17 a month. Id., at pt. iii, p. 6. After the war the non-discriminatory rate for agricultural workers was approximately $25 per month. Id. at pt. iii, p. 126.

[25] Id. at pt. ii, pp. 182, 226; pt. iii, pp. 9, 44, 45, 46; pt. iv, pp. 69, 98, 116.

established. Officials of the Freedmen's Bureau explained:

> Slavery they have given up in the old form, but they want to subdue and keep in a low place the negroes, by some compulsion which it seems to me they are trying to effect -- privately -- The idea was that the negro was to be kept subservient to the white race and compelled to labor for low wages. Contracts ..., unless regulated by the agents of the Freedmen's Bureau, have been very much on the side of the white man.[26]

> The planters are disposed, in many cases, to insert in their contracts tyrannical provisions, to prevent the negroes from leaving the plantation without a written pass from the proprietor; forbidding them to entertain strangers, or to have fire-arms.... A contract ... stipulated that the freedman, in addressing the proprietor, should always call him "master."[27]

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[26] Id. at pt. ii, p. 243 (emphasis added).

[27] Id. at pt. ii, p. 240. See also id. at pt. ii, pp. 123 ("There is a disposition on the part of citizens to secure, as far as possible, the same control over the freedmen by contracts which they possessed when they held them as slaves."), 126 ("by availing themselves of the ignorance of negroes in the making of contracts, by getting them in debt, and otherwise, they would place them ... in a worse condition than they were in when slaves").

One land owner demanded that his workers "sign a contract to work for him during their lifetime."[28] There was also considerable interest among white land owners in replacing slavery with some form of contractual peonage. In Texas and Louisiana planters agreed on a form of contract, or a series of charges, designed to insure that the debts of the freedmen would equal or exceed any wages they were owed.[29]

The detailed terms and conditions of a freedman's employment frequently were not addressed in any written contract, but were resolved on the job. Here too blacks could not expect fair, non-discriminatory treatment. "The old master was not inclined to treat them differently from what he did when they were slaves.... The old planters were unwilling to come down and make bargains in good

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[28] Id. at pt. ii, p. 228.

[29] Id. at pt. iii, pp. 80 (system of charges), 124-25 ("blank forms of contracts"); see also id. at pt. i, p. 107 (peonage); pt. ii, p. 270 (peonage); pt. iii, p. 7 (peonage); pt. iv, p. 9 (peonage).

faith with those who had been slaves."[30] By far the most widespread abuse was the beating or whipping of black workers. One official of the Freedmen's Bureau observed:

> Q. Are the people there disposed to resort to personal violence or chastisement to compel the negroes to work now?
>
> A. They are so disposed in nearly every instance. A resort to violence is the first thought that I have seen exhibited when freedmen did not act exactly to suit the employer.... It is the universal ... purpose with them ... to do that."[31]

The hearings of the Joint Committee abounded with stories of black employees who were beaten by their masters for the least transgression, or for no apparent reason whatever; such treatment was never visited upon white employees.[32]

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[30] Id. at pt. iv, p. 116.

[31] Id. at pt. iv, p. 83.

[32] Id. at pt. ii, pp. 17 (white "disposition ... to maltreat the negro"), 55 (whipping), 61 (whipping), 83 ("cruelty," "scourging" and "torturing"), 170 (beating and whipping), 188 (whipping and beating), 226 (beating)

(continued...)

Equally abundant was testimony about employers who, having received the services agreed upon by their black workers, disregarded their contractual obligations to pay them in return. After the crops of 1865 were harvested in the fall of that year, many thousands of black workers, a majority of all the freedmen in some areas, were driven from the plantations without being paid.[33] In other instances white planters simply refused to pay their black employees, provided them with a smaller proportion of the crops than had been agreed upon, attempted to deduct from their wages unjustified charges, or sought to

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[32](...continued)
228 (beating); pt. iii, pp. 42 (beating), 43 (violence), 146 (beating); pt. iv, pp. 46-47 (beating), 47 (shooting), 65 (beating).

[33] Id. at pt. ii, pp. 52, 188, 222, 223, 225, 226, 228; pt. iii, pp. 142, 173-74; pt. iv, pp. 64, 66, 68.

defraud them in other ways.[34] The Freedmen's Bureau was forced to intervene on behalf of blacks in thousands of such cases, and federal officials estimated that a majority of the wages actually paid would have been withheld but for the Bureau's action.[35]

Except in the case of Mississippi, there were no complaints regarding legal obstacles to the purchase or leasing of real property by blacks. But the legal right to buy or rent such property was meaningless, because white land owners were generally unwilling to sell or lease real

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[34] Id. at pt. ii, pp. 188, 194, 195, 225, 228, 229, 272; pt. iii, pp. 42, 43, 151 ("[t]here seemed to be a disposition on the part of a very large number of the planters to overreach ... the freedmen, and to defraud them of a part of their earnings"); pt. iv, pp. 8, 10, 37, 38 (freedmen "have universally been treated with bad faith and very few have received any compensation for work performed up to the close of the year 1865").

[35] Id. at pt. ii, pp. 19, 195; pt. vi, pp. 8, 37 ("Not one in ten [freedmen] would have received any compensation for labor performed during the year 1865, had it not been for the vigorous measures" of union army officials); 38 ("seven out of every ten who have paid wages to the freed people ... have done so over the point of the bayonet"), 45, 80 ("The negroes ... without the aid of the government, would not be able to secure their wages....").

property to freedmen.[36] A series of witnesses observed that, because of the resistance of white land owners, "it is with great difficulty that a negro can rent land to tend himself.... If the negroes will work for them they will hire them, but they are not willing to rent them lands."[37] In particular, "[f]ormer slave owners will not lease or sell land to negroes."[38] "Most of them leave their plantations lying idle rather than to sell or rent any of their lands to negroes."[39] One witness testified, "A rebel colonel told me that he would rather his property were sunk in the middle of perdition than to lease it to negroes, much less to sell it to them; and many others expressed similar

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[36] Id. at pt. ii, pp. 149, 154, 182, 235-36 243; pt. iii, pp. 4, 6, 25, 27, 30, 36, 45, 62, 66, 71, 101, 12, 151; pt. iv, pp. 10, 56, 62, 69, 117.

[37] Id. at pt. ii, p. 154.

[38] Id. at pt. iii, p. 154.

[39] Id. at pt. iv, p. 10.

sentiments."[40] When blacks succeeded in leasing land, it was often through subterfuge, such as by enlisting a white man to act as the nominal lessee.[41] Planters opposed leasing lands to blacks because it interfered with their ability to dictate the terms under which freedmen would be hired; "They say that unless negroes work for them they shall not work at all."[42]

In most states there were no complaints about any problems that had been caused by post-war legislation in the South. While there was fear that some future official action might aggravate the position of blacks,[43] there was a widespread agreement that existing private

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[40] Id. at pt. iv, p. 69; see also id. at pt. iii, p. 66 ("combination of landowners, agreed not to rent to blacks").

[41] Id. at pt. iii, pp. 4-45.

[42] Id. at pt. iv, p. 62; see also id. at pt. ii, p. 101 ("farm owners ... desire to keep negroes landless, and as nearly in a condition of slavery as it is possible for them to do"); pt. iv, p. 117 (land holders oppose selling land to blacks "because it was putting them in a position of independence....").

[43] Id. at pt. iii, pp. 18, 25, 70, 143, 183; pt. iv, p. 33.

discrimination and abuses had already rendered the situation of freedmen intolerable. There was some concern that in the future, state action might be used to support a system of de facto slavery but the record before the Joint Committee demonstrated that this insidious goal had in many areas already been achieved in part, and in some regions been accomplished in full, as a result of existing private discrimination and abuse.

B. The 1866 Congressional Debates Establish that Congress Intended § 1 of the 1866 Act to Reach Purely Private Conduct.

In light of the circumstances that existed in the South in early 1866, as reported to Congress by Schurz, the Joint Committee, and others, the question of Congressional intent raised in Runyon and Jones is an essentially pragmatic one -- did Congress intend the existing systematic oppression and even practical re-enslavement of freedmen to continue so long as the former slave owners achieved their ends solely through private acts? It would be surprising indeed if Congress,

fully aware that those goals were being pursued with considerable efficacy by means of both private conduct and governmental discrimination, chose not to forbid the success of such schemes, but only to channel the desire for restoration of slavery into private techniques alone. The debates of the thirty-ninth Congress make clear that the supporters of the Civil Rights Act were determined to end the oppression of blacks, not merely to refine the methods of their oppression.

1. Congress Included Private Actions Among the Problems It Intended to Address.

References to the problem and varieties of private discrimination against freedmen are found in virtually every debate of the thirty-ninth Congress regarding the condition of freedmen. The very first speech on the condition of former slaves, by Senator Wilson on December 13, 1865, asserted that blacks were the victims of killings, atrocities, and outrages. Wilson quoted a

letter describing the situation of blacks in Mississippi prior to the adoption of any of the black codes as "worse off in most respects than they were as slaves." Cong. Globe, 39th Cong., 1st Sess. 39-40.[44] Senator Johnson, who would later be among the chief opponents of the Civil Rights Act, promptly disputed these charges, denying the claim that the men of the South were "semi-barbarous," and challenging Wilson's "supposed means of information." Id. at 40. Senator Trumbull, although uncertain whether Wilson's charges were accurate, admonished that strong legislation would be needed "if what we have been told today in regard to the treatment of freedmen in the South is true." Id. at 43.

Wilson's allegations were reiterated in the days immediately preceding the introduction of S. 61 on January 5, 1866. Senator Sumner reported that planters

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[44] The letter is dated November 13, 1865, id. at 95; the Mississippi laws respecting freedmen were not adopted until November 25.

in South Carolina had agreed in public meetings not to rent land to blacks or "to contract with any freedman unless he can produce a certificate of regular discharge from his former owner." Id. at 93. In Tennessee "in very many cases" "rascally employers" refused to pay wages earned by their black workers. Id. at 95. Wilson defended his original charges, challenging his colleagues to examine the records and reports at the office of the Freedmen's Bureau documenting these "great atrocities and cruelties." Id. at 111. One of those who did so was Senator Trumbull.[45] A petition to the Senate from blacks in Alabama complained that "many of their people are now in a condition of practical slavery, being compelled to serve their fellow owners without pay and to call them 'master.'" Id. at 127.[46]

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[45] E. Foner, Reconstruction: America's Unfinished Revolution 1863-1877 243 (1988).

[46] The Alabama laws regarding labor contracts and apprentices were not enacted until late February, 1866.

References to such private outrages continued throughout the debates on the Civil Rights Act. Representative Wilson's opening speech in support of the bill admonished:

> the hate of the controlling class in the insurgent States toward our colored citizens is a fact against which we can neither shut our ears nor close our eyes. Laws barbaric and treatment inhuman are the rewards meted out by our enemies to our colored friends. We should put a stop to this at once and forever.

Id. at 1118 (emphasis added). Other speakers referred specifically to the killing, whipping and robbing of blacks, attacks on black schools, conspiracies by white planters not to hire freedmen, and gangs of whites enforcing a de facto pass system.[47] Representative Lawrence observed that

> [T]here is a present necessity for this bill.... [I]t would take an army of twenty thousand men to compel the planters to do justice to the freedmen. This bill takes right hold of this matter.

[47] Id. at 1159-60 (Rep. Windom), 1759 (Sen. Trumbull), 1833-35 (Rep. Lawrence), 1828-39 (Rep. Clark), App. 181 (Sen. Wade).

Id. at 1833 (emphasis added). Lawrence quoted the testimony of Major General Alfred H. Terry that:

> Many persons are treating the freedmen ... with great harshness and injustice, and seek to obtain their service without just compensation, and to reduce them to a condition which will give to the former masters all the benefits of slavery....

Id. Speakers in favor of the bill cited the reports of Generals Schurz and Grant, as well as testimony before the Joint Committee.[48] Senator Wade observed on the day of the critical vote to override the President's veto, that the "flood of testimony brought from this great committee has enlightened everybody upon the facts." Id. at 180.

There was widespread agreement with the view earlier expressed by General Schurz that the old slave owners were determined to hold freedmen in a state of

[48] Id. at 1267 (remarks of Rep. Raymond), 1407-13, 1827 (remarks of Rep. Baldwin), 1833-34 (remarks of Rep. Lawrence), 1839 (remarks of Rep. Clarke).

practical slavery.[49] Proponents of the Civil Rights Act were under no illusion that the former masters would restrict themselves to seeking to achieve that end by enacting onerous legislation, but knew that "the old slaveholders ... would resort to every means in their power." Id. at 503 (Sen. Howard). Thus, the purpose of the Civil Rights Act was not simply to bar the former slave holders from utilizing the machinery of state government to achieve that end, but to thwart altogether attempts to re-enslave and oppress the freedmen. For Senator Trumbull the critical issue was whether "this bill [will] be effective to" "end and prevent slavery," and he insisted that if the measure was adopted "we shall have secured freedom in fact." Id. at 474-76. See also id. at 1118 (Rep. Wilson), 1151-53 (Rep. Thayer), 1159 (Rep. Windom), 1759 (Sen. Trumbull), 1761 (Sen. Trumbull),

[49] Id. at 504 (Sen. Howard), 1118 (Rep. Wilson), 1125 (Rep. Cook), 1833-35 (Rep. Lawrence), 1838 (Rep. Clarke).

1828 (Rep. Baldwin). This fierce determination to end completely and for all time the subjugation of freedmen reflected the fearful cost incurred by the nation in lives and destruction in order to bring an end to chattel slavery. Senator Trumbull admonished those of his colleagues who insisted that Congress lacked the power to protect the freedmen from practical slavery:

> Go tell it, sir, to the father whose son was starved at Andersonville, or the widow whose husband was slain at Mission Ridge, or the little boy who leads his sightless father through the streets of your city, ... or the thousand other mangled heroes to be seen on every side.[50]

These are not the words of a person who believed that the whites of the rebel states were to remain free to work their will on the freedmen so long as they were careful to do so without resort to the machinery of government.

[50] Id. at 1757; see also id. at 341 (Sen. Wilson), 344 (Sen. Wilson), 504 (Sen. Howard), 1124 (Rep. Cook), 153 (Rep. Thayer), 1839 (Rep. Clarke).

Opponents of the civil rights bill focused their objections on two aspects of the bill -- nullification of state statutes and the imposition of criminal penalties on state officials who carried out those laws. As a consequence, proponents of the Civil Rights Act concentrated their own arguments on the need to deal with state discrimination. But both sides recognized that the Civil Rights Act was not limited to such discriminatory governmental measures. Senator Trumbull announced prior to introducing S. 61 that it was intended to deal with the danger that "by local legislation or a prevailing public sentiment in some of the States persons of the African race should continue to be oppressed."[51] Representative Thayer condemned "the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery, and which it is the

[51] Id. at 77 (emphasis added). See also id. (duty of Congress to protect freedmen against "any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty").

object of this bill forever to remove." Id. at 1152. Representative Kerr opposed the bill because it would apply to a church which refused to rent its most desirable pews to blacks. Id. at 1268. Senator Davis objected that the Act would apply not only to churches, but also to railroads, street cars, boats, hotels, restaurants, saloons and baths which practiced racial segregation. Id. at App. 183. During the critical days preceding the vote to override President Johnson's veto, the argument that the bill would affect such public accommodations was widely repeated in newspapers and journals supporting the veto.[52]

Davis also complained that the bill would interfere with relations between black workers and white employers, relations that he insisted would be handled in a fair manner by the parties themselves if only there were

[52] We set out in Appendix A the texts of some of these published objections.

no federal intervention:

> The passage of such a bill is calculated to produce interference between, and a disturbance of, the relations of the black laborer and his white employer, to get up feuds and quarrels.... The way to avoid that feud ... is to leave the relationship to itself and the parties to it....

Id. at 1416. This objection would have made no sense if Davis had thought the act was inapplicable to private employment relationships. President Johnson expanded on this argument in his veto message, objecting that the bill attempted to regulate by law employment questions which could be fairly resolved through ordinary economic forces. Black workers and white employers, the President urged, had

> equal power in settling the terms, and if left to the laws that regulate capital and labor, ... [would] satisfactorily work out the problem.... This bill frustrates this adjustment. It intervenes between capital and labor, and attempts to settle questions of political economy through the agency of numerous officials.

Although proponents of the Civil Rights Act were quick to disavow what they thought were deliberately inaccurate interpretations of the bill,[53] and although Senator Trumbull responded to virtually every paragraph in Johnson's veto message, no member of the House or Senate rose to dispute these descriptions of the law by Kerr, Davis, and the President.

2. Congress Understood § 1 of 1866 Civil Rights Act to Have The Same Scope as § 7 of the Vetoed Freedmen's Bureau Bill.

Section 7 of the Freedmen's Bureau Bill, introduced by Senator Trumbull as a companion to the Civil Rights Bill, extended "military protection and jurisdiction" over all cases in which persons in the former rebel States were "in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, [denied or refused] any of the civil rights or immunities belonging to white persons, including the right

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[53] Cong. Globe, 39th Cong., 1st Sess., at 1837 (Rep. Lawrence).

to make and enforce contracts ... on account of race."[54] Justice Harlan acknowledged in his dissent in Jones that § 7 would have applied to private discrimination, but insisted that the different wording of § 1 of the Civil Rights Act reflected a different intent on the part of Congress:

> In the corresponding section of the ... civil rights bill ... the reference to "prejudice" was omitted from the rights-defining section. This would seem to imply that the more widely applicable civil rights bill was meant to provide protection only against those discriminations which were legitimated by a state or community sanction sufficiently powerful to deserve the name "custom."

392 U.S. at 457.

Justice Harlan's argument would have had considerable force if § 1 limited its application to denials "in consequence of any State or local law, ordinance, police or other regulation or custom," but deleted the

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[54] The text of the bill is set forth in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 72 (1871) (emphasis added).

word "prejudice." But what is "omitted" from § 1 is not simply the word "prejudice," but the entire phrase, beginning with the word "in consequence," in which prejudice as well as laws and customs are mentioned. A closer comparison of §§ 7 and 1 suggests a conclusion opposite to that reached by Justice Harlan. The right protected by § 7 is "the ... righ[t] of white persons ... to make and enforce contracts," language substantially identical to the right-defining terminology of § 1. The phrase in § 7 referring to denials of rights "in consequence of ... law or prejudice" describes the circumstances under which military jurisdiction will be exercised, not the substance of the right to be enforced by the Freedmen's Bureau officials. The fact that Congress foresaw that the right referred to in § 7 -- and § 1 -- might be denied by reason of private "prejudice" strongly suggests that Congress understood § 7 to protect against private as well as government imposed discrimination, for

only a right to be free from private discrimination was likely to be denied "in consequence of" private prejudices.

The congressional debates make clear that Congress understood § 1 of the Civil Rights Act to have the same scope as § 7 of the vetoed Freedmen's Bureau Bill. Representative Bingham insisted that § 7 enumerated "the same rights and all the rights and privileges that are enumerated in the first section of the Civil Rights Bill." Cong. Globe, 39th Cong., 1st Sess. 1291 (emphasis added). Senator Davis, who opposed both measures, repeatedly referred to the Freedmen's Bureau Bill and the Civil Rights Bill as "twins."[55]

3. The Dissenting Opinion in Jones Is Not Persuasive.

The dissenting opinion in Jones makes two primary arguments in support of the conclusion that Congress intended § 1 of the 1866 Act to reach only state action.

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[55] Id. at 523, 575, 595; see also id. at 1121 (Rep. Rogers; civil rights bill a "relic" of Freedmen's Bureau bill).

First, Justice Harlan interprets a number of statements made during the debates as reflecting an intent on the part of Congress to reach only "state-sanctioned discrimination." 392 U.S. at 453. Second, Justice Harlan notes the existence of only a few statements either supporting or opposing coverage of private discrimination, and argues that, had Congress intended such coverage, the supporters would have defended this aspect of the bill more vigorously, 392 U.S. at 461, and the opponents would have protested this coverage more "strenuously," id. at 463. As discussed below, the remarks relied upon by Justice Harlan, when read in the context in which they were made, do not support the interpretation advanced in the dissent. And the relative lack of attention to the coverage of private racial discrimination is understandable when viewed in the historical context.

(i) There are a number of statements in the debates which stress the need to prevent discriminatory

state action. Read in the context in which they occurred, however, the passages in question emphasize only the importance of ending such invidious official conduct, and do not evidence an intent to tolerate similar conduct taken with a similar purpose by whites holding no public office. From the very outset of the debates on the Civil Rights Bill, opponents focused their arguments on two principal objections -- that § 1 would have the effect of nullifying discriminatory state statutes,[56] and that § 2 would impose criminal penalties on state officials, particularly judges, who implemented such state laws.[57] Opponents argued that any statutory invalidation of state laws violated the tenth amendment, id. at 595 (Sen.

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[56] E.g., Cong. Globe, 39th Cong., 1st Sess. 478 (Sen. Saulsbury), 499 (Sen. Cowan), 601 (Sen. Guthrie), 606 (Sen. Saulsbury), 1121 (Rep. Rogers), 1270 (Rep. Kerr), 1415 (Sen. Davis), 1680 (veto message), 1777 (Sen. Johnson), 1782 (Sen. Cowan), App. 182-84 (Sen. Davis).

[57] E.g., id. at 597, 599 (Sen. Davis), 602 (Sen. Hendricks), (Rep. Rogers), 1154-55 (Rep. Eldridge), 1265 (Rep. Davis) 1271 (Rep. Kerr), 1291 (Rep. Bingham) 1296 (Rep. Latham), 1680 (veto message), 1780-83 (Sen. Cowan), 1809 (Sen. Saulsbury).

Davis), 1977 (Sen. Johnson), App. 184 (Sen. Davis), and some, including Representative Bingham, insisted that Congress could never impose the criminal penalties on state officials, see, e.g., id. at 1291. In the face of these attacks, proponents of the Civil Rights Bill understandably devoted most of their own remarks to justifying the application of § 1 to discriminatory state statutes, and the application of § 2 to discriminatory state officials.

A number of the passages cited by Justice Harlan merely emphasize the importance of dealing with governmental discrimination. Of such limited significance are passages such as these:

> Sir, if it is competent for the new-formed Legislature of the rebel States to enact laws . . . which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; . . . then I demand to know, of what practical value is the amendment abolishing slavery?[58]

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[58] 392 U.S. at 466 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1151 (Rep. Thayer)).

> [W]hat kind of a freedom is that by which the man placed in a state of freedom is subject to the tyranny of laws which deprive him of [natural] rights . . .?[59]

> What is the necessity which gives rise for that protection? See, in at least six of the lately rebellious States the reconstructed Legislatures of those States have enacted laws which, if permitted to be enforced, would strike a fatal blow at the liberty of freed men....[60]

Statements of this sort fall far short of indicating that state action was Congress' sole concern.

In a number of instances, passages quoted by Justice Harlan are taken out of a context which give them a meaning quite different than that suggested by the dissent. For example, Justice Harlan excerpted from this statement by Representative Wilson only the first sentence:

> It will be observed that the entire structure

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[59] 392 U.S. at 466, (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1152 (Rep. Thayer)).

[60] 392 U.S. at 467 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1153).

> of this bill rests on the discrimination relative to civil rights and immunities made by the states on "account of race, color, or previous condition of slavery." That these things should not be is no answer to the fact of their existence. That the result of the recent war, and the enactment of the measures to which the events of the war naturally led us, have intensified the hate of the controlling class in the insurgent states toward our colored citizens is a fact against which we can neither shut our ears nor close our eyes. Laws barbaric and treatment inhuman are the rewards meted out by our white enemies to our colored friends. We should put a stop to this at once and forever.[61]

Read in full this passage makes clear that Wilson intended the bill to deal not only with discriminatory laws, but also "treatment inhuman . . . by our white enemies."

Justice Harlan quotes Representative Thayer as asking:

> [W]hat kind of freedom is that by which the man placed in a state of freedom is subject to the tyranny of law which deprive him of [natural] rights?[62]

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[61] Cong. Globe, 39th Cong., 1st Sess. 1118 (emphasis added). The passage in the dissenting opinion is at 392 U.S. at 465.

[62] Id. at 1152, cited at 392 U.S. at 466.

By italicizing the word "law," the dissent suggests that Thayer was concerned only about tyrannical statutes. But only seven sentences before this passage Representative Thayer more broadly condemned:

> the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery, and which it is the object of this bill forever to remove.[63]

Many of the tyrannical acts and restrictions appurtenant to slavery were taken and imposed by slave owners, rather than by any state government. The most plausible interpretation of Thayer's remarks is that he intended the bill to apply to these private abuses as well.

Justice Harlan cites the following statement by Senator Trumbull as a "wholly unambiguous statemen[t] which indicated that the bill was aimed only at 'state action':

> If an offense is committed against a colored person simply because he is colored, in a state where the law affords him the same protection as if he were

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[63] Id.

> white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in state court.[64]

A review of the page of the Congressional Globe where this sentence appears, however, makes it clear that Trumbull was discussing, not the bill as a whole, but the penal provisions of the bill, which are contained in § 2 and which were expressly limited to state action and to customs. The sentence immediately before the portion of the speech quoted by Justice Harlan sets forth the reason why the punitive provisions would be inapplicable in the hypothesized case. The explanation is not that the bill as a whole does not reach private conduct, but that in § 2 "[t]hese words 'under color of law' were inserted as words of limitation."[65] Such "words of limitation" would have been entirely unnecessary if § 1 itself had been limited to actions under color of law and custom.

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[64] 392 U.S. at 460 (citing Cong. Globe, 39th Cong., 1st Sess. 1758).

[65] Cong. Globe 39th Cong., 1st Sess. 1758.

Another "wholly unambiguous" statement cited by Justice Harlan is excerpted from the following statement by Senator Trumbull. The portion actually reproduced in the dissenting opinion is underscored:

> The President in his annual message . . . was . . . decided in the assertion of the right of every man to life, liberty, and the pursuit of happiness. This was his language . . . . "good faith requires the security of the free men in their liberty and their property." . . . Acting from the considerations I have stated, and believing that <u>the passage of a law by Congress, securing equality in civil rights when denied by State authorities</u> to freed men and all other inhabitants of the United States, would do much to relieve anxiety in the North, to induce the southern states to secure these rights by their own action, and thereby remove many of the obstacles to an early reconstruction, I prepared the bill substantially as <u>it is</u> . . . .[66]

Justice Harlan italicized the words "when denied by State authorities." The omission of the reference to the other "considerations" obscured the fact that Trumbull actually gave not one but two reasons for proposing the act. That

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[66] 2 Cong. Globe, 39th Cong., 1st Sess. 1760. The partial quotation by Justice Harlan is at 392 U.S. at 461.

other consideration, the protection of the lives, property and liberty of freedmen, almost certainly referred to private action, since attacks on the lives and property of blacks were virtually all committed by private citizens.

Other passages cited by Justice Harlan would, if construed in the manner he suggests, simply prove too much. The dissent cites, for example, the following remark by Representative Bingham:

> [W]hat, then, is proposed by the provision of the first section? <u>Simply to strike down by congressional enactment every state constitution which makes a discrimination on account of race or color</u> in any of the civil rights of the citizen.[67]

If by "simply" Bingham meant "solely," this passage would indeed indicate that private acts of discrimination were not covered. But Bingham cannot have meant "solely," because that would limit § 1 to state constitutions, and render it inapplicable, for example, to state statutes or

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[67] 392 U.S. at 467 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1291).

actions by state officials. Similarly, Senator Trumbull is quoted as asserting:

> [This bill] will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.[68]

This too would support Justice Harlan's view of the 1866 act, if Trumbull were asserting that Kentucky could remove itself from the operation of the act by repealing all discriminatory statutes. But that cannot have been Trumbull's meaning, since Justice Harlan concedes that the act clearly covers discriminatory administration of neutral laws, state enforcement of private agreements to discriminate,[69] and even acts of private persons if done pursuant to "custom," 392 U.S. at 457.

The dissent notes other similarly intriguing remarks by Senator Trumbull:

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[68] 392 U.S. at 459 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 476).

[69] Hurd v. Hodge, 334 U.S. 24 (1948).

> Why, sir, if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky.[70]

> This bill ... could have no operation in Massachusetts, New York, Illinois, or most of the states of the Union.[71]

But these remarks cannot literally mean the Civil Rights Act would have no operation in these states because, even if a state and all its subdivisions did not engage in discrimination, the act would still apply, as Justice Harlan acknowledged, to "those discriminations which were legitimated by a ... community sanction sufficiently powerful to deserve the name 'custom'." 392 U.S. at 457. In each of these cases the context in which the remark was uttered makes clear that Bingham and Trumbull meant only that, in the absence of specified forms of

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[70] 392 U.S. at 459, (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 476).

[71] 392 U.S. at 460 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1761).

discrimination, the act would not apply to the type of state action referred to.[72]

Justice Harlan cites a statement by Senator Trumbull that § 2 of the Thirteenth Amendment was adopted:

> for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free.[73]

Since Trumbull "indicated that he would introduce separate bills to enlarge the powers of the recently founded Freedmen's Bureau and to secure the freedmen in their civil rights" immediately after making this statement, Justice Harlan inferred that the stated purpose of § 2 of the Thirteenth Amendment "also [was] the aim of the promised bills." 392 U.S. at 455-56. However, this

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[72] The last of the Trumbull quotation, for example, is preceded by the following sentence: "This will in no manner interfere with the municipal regulations of any State which protects all alike in their rights of person and property." Id. at 1761.

[73] 392 U.S. at 455 (citing Cong. Globe, 39th Cong., 1st Sess. 43).

reasoning supports the conclusion that Trumbull intended the Civil Rights Bill to cover private racial discrimination, since there is no doubt that the Freedmen's Bureau Bill reached such conduct. Certainly, the fact that the Freedmen's Bureau Bill extended to private conduct demonstrates that Trumbull did not use "and none other" to mean "only." Indeed, Trumbull cannot have meant that § 2 of the Thirteenth Amendment reaches only actions by State legislatures. Both §§ 1 and 2 obviously extend as well to enslavement at the hands of any other branch of state government or by state subdivisions, and even the most conservative members of the thirty-ninth Congress agreed that § 2 authorized federal legislation to protect freedmen from private individuals who sought to restrain and enslave them by force. Read in the context of the debate in which they were spoken, as Justice Stewart noted in Jones, the words "and none other" were meant to emphasize that § 2 was adopted "precisely," not

exclusively, to authorize congressional action to nullify oppressive state laws. 392 U.S. at 430 n.48.

Finally, Justice Harlan cites a statement by Trumbull in which, after objecting to several recently adopted state laws, the Senator commented:

> [t]he purpose of the bill under consideration is to destroy all these discriminations, and carry into effect the constitutional amendment.[74]

The portion of this passage beginning with "and" makes clear that the Bill had a second broader purpose, to assure implementation of the Thirteenth Amendment.

(ii) Justice Harlan also relies upon Congress' relative silence with respect to coverage of private discrimination. In the course of a speech justifying § 3 of the Civil Rights Bill, which conferred jurisdiction on the federal courts to redress violations of § 1, Senator Trumbull asserted that § 2 of the Thirteenth Amendment

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[74] 392 U.S. at 458 (emphasis by Justice Harlan)(citing Cong. Globe, 39th Cong., 1st Sess. 474).

provided authority to establish such jurisdiction where needed to protect freedmen from discriminatory laws or customs. Cong. Rec., 39th Cong., 1st Sess. 1759. Justice Harlan argued:

> If the bill had been intended to reach purely private discrimination it seems strange that Senator Trumbull did not think it necessary to defend the surely more dubious federal jurisdiction over cases involving no state action whatsoever.

392 U.S. at 461. Similarly, Justice Harlan concluded that if the bill's opponents thought that the bill reached wholly private conduct, "it seems a little surprising that they did not object more strenuously." 392 U.S. at 463.

The focus of Senator Trumbull's remark, however, is entirely understandable when one notes that his entire speech was intended as a response to President Johnson's veto message. The aspect of § 3 to which the President objected was the existence of what he believed would be exclusive federal jurisdiction over cases in which states denied the rights secured by § 1. Cong. Rec., 39th Cong.,

1st Sess. at 1680-81.

More importantly, Justice Harlan's argument reflects an historical anachronism. Writing in 1968, after the adoption of the Fourteenth Amendment and the decision in the Civil Rights Cases, 109 U.S. 3 (1883), limiting the reach of that amendment to state action, Justice Harlan understandably regarded federal prohibitions against private discrimination as more unusual, and constitutionally more "dubious," than a federal law against state discrimination. But in early 1866 these developments lay in the future. At that point in American constitutional history, the imposition of federal obligations on state officials was the more dubious proposition. Prigg v. Pennsylvania, 16 Pet. 539 (1842), and Kentucky v. Dennison, 24 How. 66 (1861), then held that Congress generally could not impose such duties on

states or their officials.[75] Justice Harlan suggested that the intent of the framers of the 1866 Act be construed in light of the 1883 decision in the Civil Rights Cases, 392 U.S. at 458 n.19, but the case actually cited during the 1866 debates was the 1842 decision in Prigg.[76] Thus, in the constitutional context in which the 1866 Act was debated, it was the imposition of federal restrictions on states and state officials, not on individuals, that was particularly likely to encounter fierce opposition.

III.

CONGRESS HAS ADOPTED THE PRINCIPLE THAT § 1981 PROHIBITS PRIVATE RACIAL DISCRIMINATION

The Court has requested additional briefing and argument on whether it should reconsider the ruling in Runyon v. McCrary, 427 U.S. 160 (1976), that 42 U.S.C. § 1981 prohibits private contractual discrimination on the

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[75] See Monell v. New York City Dept. of Soc. Services, 436 U.S. 658, 676-78 (1978).

[76] Cong. Globe, 39th Cong., 1st Sess. 1270 (Rep. Kerr), 1294 (Rep. Wilson), 1836 (Rep. Lawrence). Cf. id. at 1154 (Rep. Eldridge).

basis of race. The Runyon decision is part of a line of cases concerning the scope and meaning of 42 U.S.C. §§ 1981 and 1982 that began in 1968 with Jones v. Mayer Co., 392 U.S. 409, and is capped by three unanimous decisions in 1987.[77]

The decisions in Jones, Johnson, Runyon, McDonald and other § 1981 and § 1982 cases do not stand alone as an independent body of law that can be internally revised with no external consequences. Rather, the chronology of developments over the past twenty-four years shows that the Court's decisions interpreting §§ 1981 and 1982 have been woven into the larger body of laws protecting civil rights that has been developed

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[77] Goodman v. Lukens Steel Co., 482 U.S. __, 107 S. Ct. 2617 (unanimous agreement that private racial discrimination prohibited by § 1981); St. Francis College v. Al-Khazraji, 481 U.S. __, 107 S. Ct. 2022 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. __, 107 S. Ct. 2019 (1987). The other cases are: Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Memphis v. Greene, 451 U.S. 100 (1981); General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

through the interaction of the courts, Congress and the executive branch.

As we set out below, Congress has consistently expressed its intent to leave § 1981 standing as an independent remedy for employment discrimination, has demonstrated its awareness of decisions of this Court and the lower courts that have held that the section prohibits discrimination by private employers, and has specifically broadened the remedies available in § 1981 actions against private defendants to include attorneys' fees. These actions establish Congress' agreement with, acquiescence in, and ratification and adoption of, the holdings in Runyon, Johnson and McDonald, among others.

This case does not, of course, present an instance where Congress has reenacted a statute in light of court decisions interpreting it, since there was no need to reenact § 1981. There is, however, no meaningful

distinction between Congress' actions concerning § 1981, and the amendment or reenactment of statutes involved in numerous cases in which the Court has concluded that Congress adopted Court precedents.[78]

Indeed, it is difficult to conceive of a clearer example of Congress' adoption of judicial interpretations of existing statutes -- an adoption that goes beyond mere acquiescence or even ratification. The chronology below shows that Congress was not only aware of, but expressed specific approval of, the Court's decisions in Jones,

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[78] E.g. Lindahl v. OPM, 470 U.S. 768 (1985) (amendment of statute without explicitly repealing Supreme Court decision creates presumption that Congress intended to embody the doctrine in amended statute); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) (where statute amended in reliance upon Supreme Court interpretation, the Court is no longer free to change its interpretation); Shapiro v. United States, 335 U.S. 1 (1948); United States v. South Buffalo Railway Co., 333 U.S. 771 (1948) (rejection of proposed amendment to nullify judicial interpretation demonstrated a deliberate decision not to modify the Act; therefore, Court could not change its interpretation); Francis v. Southern Pacific Co., 333 U.S. 445 (1948). See also Monessen Southwestern Railway Co. v. Morgan, 56 U.S.L.W. 4494, 4496 (U.S. June 6, 1988) ("Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that [interpretation].").

Johnson and McDonald, as well as numerous lower court decisions applying them. Congress not only rejected amendments that would have nullified those decisions, but built upon them when it specifically provided for awards of attorneys' fees in actions brought under §§ 1981 and 1982 against private parties. These actions go far beyond what the Court found to constitute acquiescence by Congress in the revenue ruling at issue in Bob Jones University v. United States, 461 U.S. 574, 599-600 (1983). Given the events in Congress, the principle that §§ 1981 and 1982 prohibit private racial discrimination has attained the force of an explicit legislative enactment.

Civil Rights Act of 1964

In enacting the first major piece of modern civil rights legislation, Congress left no doubt that the Civil Rights Act of 1964 was intended to supplement, not to supplant or cut back on, existing remedies.[79] Senator Tower offered an amendment that would have made Title VII the exclusive remedy for employment discrimination. 110 Cong. Rec. 13650-13652. Senator Ervin, arguing in favor of the amendment, read the text of § 1981 into the record. Since Title VII as enacted in 1964 covered only private employers, it seems clear that members of the Senate, including Senator Ervin, believed that § 1981 already prohibited such private discrimination. The Senate rejected the Tower amendment, making clear its intent to retain other statutory remedies.

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[79] An explicit disclaimer of any adverse effect on the availability of other remedies was included in several Titles of the 1964 Act. See 42 U.S.C. Section 2000a-6(b) (Title II--Public Accommodations), Section 2000b-2 (Title III-Desegregation of Public Facilities), Section 2000c-8 (Title IV--Discrimination in Public Education).

The Jones Decision

In 1968, the Court ruled in Jones v. Mayer that § 1 of the Civil Rights Act of 1866 "was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein -- including the right to purchase or lease property." 392 U.S. at 436. The Court had the benefit of detailed analyses of the legislative history provided by the parties, the United States and several other capable amici. Justice Stewart's opinion, joined by six other Justices, thoroughly canvassed the history and precedents and responded to detailed arguments made in the dissenting opinion.[80] Although primarily addressed to § 1982, the opinion in Jones made clear that the Court's reasoning also applied to § 1981.[81]

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[80] 392 U.S. at 449 (Harlan, J., joined by White, J., dissenting).

[81] 392 U.S. at 435-436 (interpreting § 1 of 1866 Act), 422 n.28 (§ 1981 derives from § 1 of 1866 Act), 442 n.78.

The Fair Housing Act of 1968

The oral argument in Jones was presented on April 1 and 2, 1968. On April 10, 1968, Congress passed the Fair Housing Act.[82] Congress was fully aware of the pendency of the Jones case, and of the possibility that § 1982 would be construed to cover private conduct.[83] Congress was also aware that the procedures and remedies under § 1982 would be different from those under the Fair Housing Act.[84] With this background, Congress explicitly provided that the Fair Housing Act does not "invalidate or limit any law ... that grants, guarantees, or protects the rights ... granted by this title

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[82] Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, codified at 42 U.S.C. § 3601 et seq. (1982).

[83] During the floor debate on the Fair Housing Act, Representative Kelly recited the text of § 1982, described the Jones case and explained that the Attorney General had informed the Court that "the scope [of § 1982] was somewhat different, the remedies and procedures were different, and that the new law was still quite necessary." 114 Cong. Rec. 9601-9602 (1968).

[84] See note 82, supra.

..." 42 U.S.C. § 3615 (1982).

Court Decisions: 1968-1972

In 1969, the Court ruled in Sullivan v. Little Hunting Park, 396 U.S. 229, that § 1982 prohibits a private recreation association from withholding, on the basis of race, approval of an assignment of membership that was transferred incident to a lease of real property.[85] The Court concluded that "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection intended to be afforded by § 1 of the Civil Rights Act of 1866." 396 U.S. at 237.

The impact of the Jones and Sullivan decisions on § 1981 and its scope was not lost on the lower federal courts. These courts immediately began to apply § 1981

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[85] Three members of the Court dissented, 396 U.S. at 241 (Harlan, J., joined by Burger, C.J., and White, J.).

to private discrimination related to contracts.[86] The federal courts fully embraced the implications of the Jones decision and without hesitation applied both §§ 1981 and 1982 to various forms of private discrimination.

[86] The lower court cases from 1968 to 1972 are set out in Appendix B.

Equal Employment Opportunity Act of 1972

In 1972, Congress amended Title VII of the Civil Rights Act of 1964.[87] The 1972 legislative history shows that both the Senate and the House fully understood and approved of the broad scope of § 1981, and its relationship to Title VII.

In the Senate, Senator Hruska introduced an amendment which would have made Title VII the exclusive remedy for employment discrimination. 118 Cong. Rec. 3172 (1972). He argued that current law permitted "a multiplicity of actions to be instituted against a respondent before a number of separate and distinct forums for the same alleged offense." Id. at 3172. He used as an example "a black female employee" complaining of discrimination with regard to "denial of

[87] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 108.

either a promotion or a pay raise" by her union and employer. Id. at 3368. He noted that among other remedies, the employee could "completely bypass both the EEOC and the NLRB and file a complaint in Federal court under the provisions of the Civil Rights Act of 1866 against both the employer and the union." Id. at 3173. Senator Hruska argued that the availability of such multiple remedies "could result in the virtual bankruptcy of a small employer or labor organization." Id. at 3172.[88] Thus, there can be no doubt that the Senator was referring to actions against private defendants and that he understood § 1981 to cover the terms and conditions of employment.

[88] Senator Hruska also contended that the availability of a "hodge-podge," 118 Cong. Rec. at 3368, of multiple remedies "dissipated" the EEOC conciliation process, id. at 3172, 3368, and discouraged voluntary compliance, id. at 3961. He urged that his amendment be adopted to correct these "confusing and chaotic conditions," id. at 3369.

Senator Hruska's proposal was forcefully rejected by Senator Williams, the floor manager of the bill.[89] Senator Williams emphasized that the Hruska amendment "would be inconsistent with our entire legislative history of civil rights."[90] He noted that the 1972 bill "is an improvement [on the 1964 Act] which is premised on the continued existence and vitality of other remedies for employment discrimination." Id. at 3371. Senator Williams went on to discuss the interrelationship between

[89] This objection to the Hruska amendment was shared by the executive branch. During hearings on the 1972 amendments, Assistant Attorney General David Norman testified:

> "[W]e are concerned that ... there be no elimination of any of the remedies which have achieved some success in the effort to end employment discrimination. In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination."

Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2515, S. 2617 and H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess. 163 (1971) (quoted at 118 Cong. Rec. 3369).

[90] See also id. at 3371 (Hruska amendment "would severely weaken our overall effort to combat the presence of employment discrimination").

Congress and the courts in "a concentrated effort to eliminate the presence of this national blight":

> The law against employment discrimination did not begin with title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination was first provided by the Civil Rights Acts of 1866 and 1871.

Id.[91]

Both Senator Williams and Senator Javits emphasized the benefits of retaining the § 1981 remedy against private employers. Senator Williams argued that "[t]he peculiarly damaging nature of employment discrimination is such that the individual, who is frequently forced to face a large and powerful employer, should be accorded every protection that the law has in its purview, and that the person should not be forced to

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[91] See also id. at 3371 ("It is not our purpose to repeal existing civil rights laws."), 3372 ("We are dealing with a problem in this country that needs all available resources ... One way to reach [this problem] is not to strip from [the victim of discrimination] his rights that have been established, going back to the first Civil Rights Law of 1866").

seek his remedy in only one place." Id. at 3372. He also noted that the other remedies are needed to provide relief in situations that Title VII does not cover. Id.

Senator Javits was even more explicit regarding the specific benefits of retaining "the possibility of using civil rights acts long antedating the Civil Rights Act of 1964." Id. at 3370. He pointed out that these "other remedies are not surplusage." Id. at 3961. Rather, they provide a "valuable protection" to address "a given situation which might fall, because of the statute of limitations or other provisions, in the interstices of the Civil Rights Act of 1964." Id. at 3370. Such "interstices" included "cases in which third parties have been guilty of bringing about the discrimination." Id. at 3962.[92] The Hruska amendment was rejected twice by the Senate. Id. at 3373, 3965.

In the House of Representatives, the Committee

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[92] The bill's sponsors concluded that it would be better to abandon the Bill than to permit it to become a vehicle for repealing § 1981 and other remedies. Id. at 3963.

Report "emphasize[d] that the individual's right to file a civil action in his own behalf, pursuant to [§ 1981] is in no way affected."[93] 92d Cong., 1st Sess. 18. This Report cited "[t]wo recent court decisions," which applied § 1981 to private employment discrimination,[94] as affirming the "Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two

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[93] The House Report concluded: "Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination." H.R. Rep. No. 238, at 18-19.

The Senate Report is consistent, stating:

> "The committee would also note that neither the above provisions regarding the individual's right to sue under title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws."

S. Rep. No. 415, 92d Cong., 1st Sess. 24 (1971).

[94] Sanders v. Dobb Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948 (1971), and Young v. I. T. & T., 438 F.2d 757 (3d Cir. 1971).

procedures augment each other and are not mutually exclusive." Id. at 19.

On the floor of the House, the "Erlenborn substitute" bill was adopted in place of the bill reported by the House Judiciary Committee. The major feature of the Erlenborn substitute was that it provided for court enforcement by the EEOC, rather than for agency "cease and desist" powers. The Erlenborn substitute also included a provision to make Title VII the exclusive remedy.[95] The Erlenborn substitute passed in the House by a vote of 200 to 195. Id. at 32111. In conference with the Senate, the court enforcement mechanism of the Erlenborn substitute was retained, but the exclusive

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[95] Representative Erlenborn explained that a party who proceeds under the 1964 Act can also file an action "under the old Civil Rights Act of 1866." 117 Cong. Rec. 31973 (1971). Since the 1964 Act covered only private employers, there can be no doubt that Representative Erlenborn was referring to suits against private employers under § 1981. Representative Erlenborn noted that "in our substitute bill ... [t]here would no longer be recourse to the old 1866 civil rights act." Id. Critics of the Erlenborn substitute argued that, among other things, the substitute would "repeal[] the Civil Rights Act of 1866." Id. at 31978 (Rep. Eckhardt). See also 117 id. at 32100 (Rep. Hawkins).

remedy provision was dropped. H.R. Rep. No. 899, 92d Cong. 2d Sess. 17 (1972) (Conference Report). Thus, Congress endorsed the judicial interpretation of § 1981 as extending to private employment discrimination and chose to preserve the § 1981 remedy as an important part of the scheme to eliminate racial discrimination.

Court Decisions: 1973-1976

In 1973, the Court unanimously held that § 1982 prohibited racial discrimination by a private swimming pool club that gave a membership preference to property owners in a defined geographic area. Tillman v. Wheaton-Haven, 410 U.S. at 437. The Court again indicated that § 1981 as well as § 1982 covers private discrimination.[86]

In 1975, the Court unanimously held that § 1981 provides a cause of action for private racial discrimination

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[86] "In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently..." 410 U.S. at 440.

in employment. Johnson, 421 U.S. at 459-460; id. at 468 (Marshall, Douglas & Brennan, JJ., concurring in part and dissenting in part). The Court cited many of the lower court decisions that had reached this conclusion. 421 U.S. at 459 n.6.

In deciding that the statute of limitations on a § 1981 claim of employment discrimination is not tolled while an administrative charge under Title VII was pending, the Court in Johnson analyzed the relationship between § 1981 and Title VII. Relying in large part on the 1972 legislative history of Title VII, the Court concluded that even though "the filing of a lawsuit [under § 1981] might tend to deter efforts at conciliation, ... these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies."

421 U.S. at 461.[97]

In June 1976, the Court decided Runyon v. McCrary and McDonald v. Santa Fe Trail Transportation Co. on the same day. With two Justices dissenting in each case,[98] the Court held in Runyon that § 1981 bars racial discrimination by a private school, 427 U.S. at 172, and held in McDonald that § 1981 bars racial discrimination by a private employer against a white worker, 427 U.S. at 287. The Court in both Runyon and McDonald had the benefit of numerous amicus briefs from the United States and private institutions. The majority and the dissenters produced lengthy opinions that fully considered and discussed the legislative history

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[97] The United States filed a brief in Johnson, which concluded that "Congress ... clearly intended that [employees aggrieved by racial discrimination] should be permitted to pursue their rights under both Title VII and Section 1981." Brief for the United States as Amicus Curiae, at 11-12.

[98] Runyon, 427 U.S. at 192 (White, J., joined by Rehnquist, J., dissenting); McDonald, 427 U.S. at 296 (White, J., joined by Rehnquist, J., concurring in part and dissenting in part). Two Justices concurred in Runyon. 427 U.S. at 187 (Powell, J.); id. at 189 (Stevens, J.).

and the prior cases.

Civil Rights Attorney's Fees Awards Act of 1976

In the Fall of 1976, Congress enacted the Civil Rights Attorney's Fees Awards Act. The clarity of Congress' endorsement of § 1981's coverage of private discrimination is established by the sequence of events leading up to the passage of the Fees Act. In 1975, the Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, ruled that attorneys' fees ordinarily may not be awarded absent an explicit statutory authorization. The Court thus overruled a series of lower court decisions that had permitted the recovery of attorneys' fees in cases brought under the various Reconstruction Era Civil Rights Acts, including §§ 1981 and 1982. 421 U.S. at 270, n. 46. On June 25, 1976, the Court decided Runyon and McDonald. In June and September of 1976, the Senate and House committee

reports on the Civil Rights Attorney's Fees Awards Act were issued[99] and the Act itself was passed by the Senate on September 29 and by the House on October 1, 1976.[100]

The specific purpose of the Act was to overrule Alyeska *insofar* as it applied to cases brought under §§ 1981 and 1982 and the other Reconstruction Era civil rights statutes. Thus, the Senate Report noted:

> [F]ees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights.

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[99] S. Rep. No. 1011, 94th Cong., 2d Sess.; H.R. Rep. No. 1558, 94th Cong., 2d Sess.

[100] Pub. Law No. 94-559, 90 Stat. 2641, codified at 42 U.S.C. § 1988.

S. Rep. No. 1011, at 4.[101] The House Report discussed § 1981 and cited with approval the decision in McDonald v. Santa Fe Trail Transportation Company, as well as its precursor, Johnson v. Railway Express Agency. H.R. Rep. No. 1558 at 4.[102]

During the floor debates on the availability of attorneys' fees, the existence of a cause of action under § 1981 for private discrimination was recognized.[103] Representative Drinan, the floor leader in the House,

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[101] The Senate Report also incorporated by reference a list of cases summarized in Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., pt. III, pp. 888-1024, 1060-62 (1973). S. Rep. No. 1011, at 4 n.3. A number of these cases were actions brought under §§ 1981 and/or 1982 against private parties. Hearings at 949, 953, 957-963, 966.

[102] The House Report similarly cited and discussed with approval the Court's decisions in Tillman and Jones. H.R. Rep. No. 1558 at 4.

[103] See 122 Cong. Rec. 35126 (1976) (Rep. Fish) (citing Lee v. Southern Home Sites, 429 F.2d 290 (5th Cir. 1970) and Brown v. Bailey, 331 F. Supp. 1033 (N.D. Tex. 1971)); id. (Rep. Kastenmeier) (citing case of "the family of a veteran of the U.S. Army who could not be buried in a local cemetery because his skin was black" [Terry v. Elmwood Cemetery, 307 F. Supp. 369 (N.D. Ala. 1969)]).

emphasized that §§ 1981 and 1982 and the other statutes to which the bill would apply:

> generally prohibit the denial of civil and constitutional rights in a variety of areas, including contractual relationships, property transactions, and federally assisted programs and activities. [The Fees Act] would not make any substantive changes in these statutory provisions. Whatever is presently allowed or forbidden under them would continue to be permitted or proscribed.

122 Cong. Rec. at 35122.[104]

The Fees Act itself refers specifically to §§ 1981 and 1982. 42 U.S.C. § 1988. The express purpose of the Fees Act was to provide an additional incentive to plaintiffs to vindicate the rights guaranteed by §§ 1981 and 1982 and the other Reconstruction Era civil rights statutes. S. Rep. No. 1011 at 2-3; H.R. Rep. No. 1558 at 2-3. The only possible reason for Congress' inclusion of §§ 1981 and 1982 within the Fees Act is to encourage plaintiffs to use those sections to remedy private

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[104] See also 122 Cong. Rec. at 31472 (Sen. Kennedy).

discrimination. Section 1983, which is also covered by the Fees Act, provides a cause of action with respect to governmental action that violates § 1981 or 1982. Thus, if §§ 1981 and 1982 did not reach private action, their inclusion in the Fees Act would be redundant.

Court Decisions Since 1976

Since 1976, the prohibition of private racial discrimination by §§ 1981 and 1982 has been treated as well-settled by all members of the Court participating in such cases.[105]

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[105] Memphis v. Greene, 451 U.S. at 120 (majority), 147 (dissenting opinion); General Building Contractors v. Pennsylvania, 458 U.S. at 387 (majority), 406 (concurring opinion) (1982); St. Francis College v. Al-Khazraji, 107 S. Ct. at 2026 ("petitioner college, although a private institution, was ... subject to [§ 1981's] statutory command"); Shaare Tefila Congregation v. Cobb, 107 S. Ct. at 2021; Goodman v. Lukens Steel Co., 107 S. Ct. at 2625 ("courts below ... properly construed and applied ... § 1981" in finding private union liable). See also Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 632 (1979)(White, J., concurring) (remedies for violations of §§ 1981 and 1982 "applicable to private deprivations as well as deprivations under color of state law"); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. ___, 107 S. Ct. 2494 (1987) (ruling on prevailing party's right to recover cost of expert witness in context of a § 1981 employment discrimination lawsuit against a private defendant).

This chronology makes clear that for almost a quarter of a century, Congress has fashioned modern civil rights laws with a detailed understanding of judicial decisions regarding §§ 1981 and 1982, and in reliance on that case law. These events reveal a tremendous depth of understanding by Congress of the meaning and significance of the Court rulings. Congress, in legislating on the subject of civil rights, did not have simply an abstract idea that some other overlapping remedies might exist. Instead, Congress understood the details and nuances of Reconstruction Era remedies and their relationship to modern enactments. Congress knew, and considered it desirable, that § 1981 provides a remedy where the statute of limitations has run under Title VII; that § 1981 covers employers too small to be included in Title VII; that a claimant can go directly into court under § 1981 or § 1982; that § 1981 has fewer "technical prerequisites" than Title VII; and that the procedures and

remedies are different under § 1982 and the Fair Housing Act.

The chronology also makes clear that Congress adopted the body of law interpreting §§ 1981 and 1982, including application of those provisions to the terms and conditions of employment. That application of § 1981 was first approved by the Court in Jones, which held that § 1981 prohibits racially motivated private interference with performance of an employment contract.[106] Following Jones, several of the early lower court rulings applied § 1981 to racial discrimination in the conditions of employment, such as discrimination in work assignments and racial harassment. For example, in Young v. I.T.&T., 438 F.2d 757 (3rd Cir. 1971), the plaintiff alleged that § 1981 was violated when he was

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[106] The Court concluded that where "a group of white men had terrorized several Negroes to prevent them from working in a sawmill ... there was no doubt that the [whites] had deprived their Negro victims, on racial grounds, of the opportunity to dispose of their labor by contract," in violation of § 1981. 392 U.S. at 441-42, n. 78 (1968) (overruling Hodges v. United States, 203 U.S. 1 (1906)).

harassed "maliciously and wantonly" by his union and employer.[107]

When Congress amended Title VII in 1972, it clearly understood that discrimination in the terms and conditions of employment is prohibited by § 1981. One of the cases cited by the House Report as affirming that § 1981 is "coextensive" with Title VII was Young v. I.T.&T., which involved application of § 1981 to a claim of racial harassment. Significantly, the Title VII remedies to which the § 1981 "right to sue" is "coextensive" include protection against discrimination in the "terms and conditions of employment." 42 U.S.C. § 2000e-2

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[107] Accord Bourdreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971)(applying § 1981 to claim that undesirable jobs were always assigned to blacks); Long v. Ford Motor Co., 496 F.2d 500, 505-506 (6th Cir. 1974)(§ 1981 applies to claim of discrimination in training). See also United States v. Medical Society of South Carolina, 298 F. Supp. 145, 148-149 (D.S.C. 1969) (private hospital's segregation of outpatients); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (private school policy prohibiting interracial romantic relationships).

(1982).[108] Also in 1972, Senator Hruska's example of a lawsuit under § 1981 for salary discrimination shows that he understood the scope of § 1981 to be broader than did the Fourth Circuit in this case.

The Court in Johnson cited two cases that applied § 1981 to a claim of discriminatory terms and conditions of employment. 421 U.S. at 459 n.6 (citing Young v. I.T.&T.), 457 n.4 (citing Bourdreaux v. Baton Rouge Marine Contracting Co.). Significantly, the plaintiff's claims in Johnson primarily concerned racial harassment and other racial discrimination in the terms and conditions of employment. See 421 U.S. at 455 (seniority rules and job assignments). The petitioner's brief opened with the statement: "Petitioner Willie Johnson, Jr., is a black man who claims to have been subjected by

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[108] This protection had been construed prior to 1972 to encompass racial harassment on the job. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

respondents to racial discrimination in the terms and conditions of employment." Brief for Petitioner at 2 (emphasis added). The Complaint alleged, inter alia, that the employer "assigns, reassigns, promotes and otherwise acts or fails to act" in a discriminatory manner. Supreme Court Appendix at 6a (Complaint ¶ V(2)).[109] In amending the Fees Act in 1976, Congress explicitly relied upon the Johnson decision, as discussed above.

IV.

THE DOCTRINE OF STARE DECISIS COMPELS REAFFIRMATION OF THE DECISIONS IN RUNYON AND JONES

Petitioner explains in Parts I and II above that Runyon and Jones are consistent with the intent of Congress when it enacted, reenacted and codified §§ 1981 and 1982. But even without revisiting the merits of the

[109] The EEOC Final Investigative Report, attached to the Complaint, described a variety of allegations, including racial harassment of Willie Johnson, "more severe" work orders and discipline for black employees and "dual standards, based on race, for conditions of employment and disciplinary action." Supreme Court Appendix at 22a, 30a.

Runyon and Jones decisions, the doctrine of stare decisis mandates that those decisions be retained.

"[T]he doctrine of stare decisis is ... a powerful force in our jurisprudence...." United States v. Maine, 420 U.S. 515, 527 (1975).[110] Among the "weighty considerations" that underlie the doctrine are "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970). This doctrine applies with most

[110] Accord Welch v. State Dept. of Highways, 483 U.S. __, 107 S. Ct. 2941, 2956-57 (1987) ("the doctrine of stare decisis is of fundamental importance to the rule of law"); Vasquez v. Hillery, 474 U.S. 254, 265-266 (1986); Miller v. Fenton, 474 U.S. 104, 115 (1985); Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 (1980).

force in situations where the Court has definitively construed a federal statute.[111]

A. Widespread Reliance on Runyon and Jones Strongly Supports Reaffirmation of Those Decisions.

The case for stare decisis is compelling where, as here, Congress has relied and built upon the Court's precedents in enacting subsequent legislation.[112] As discussed above, Congress' actions in approving and building upon the rulings in Runyon and Jones are much

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[111] Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change [the] Court's interpretation of its legislation"). Accord NLRB v. Longshoremen, 473 U.S. 61, 84 (1985); Oklahoma City v. Tuttle, 471 U.S. 808, 818 n.3 (1985); Bonic v. United States, 446 U.S. 308, 404 (1980); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 60 (1977) (White, J., concurring in the judgment). Even in the area of constitutional interpretation, stare decisis plays a very large role. See, e.g., H. Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723 (1988).

[112] See, e.g., Miller v. Fenton, 474 U.S. at 115 (1985) (relying on the "benefit of some congressional guidance" in declining to overturn a prior ruling); Patsy v. Florida Board of Regents, 457 U.S. 496, 501 (1982) (factor in applying stare decisis is "whether overruling [a prior decision] would be inconsistent with more recent expressions of congressional intent"); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 695 (1978). See also Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 (1986).

stronger than the congressional actions (or inactions) found determinative in any other case.

Widespread reliance upon Runyon and Jones has occurred at every level of government and private activity. The Solicitor General filed a brief on behalf of the United States as amicus curiae in Jones v. Mayer, Sullivan v. Little Hunting Park, Tillman v. Wheaton-Haven, Johnson v. Railway Express Agency, Runyon v. McCrary, and McDonald v. Santa Fe, arguing in each case for broad coverage of private discrimination under §§ 1981 and 1982. The brief in Runyon indicated that the Attorney General and the Department of Health, Education and Welfare, have significant responsibilities for "efforts to desegregate public educational systems," and that these efforts "may be seriously impaired" "[i]f private schools may lawfully deny admission to black children on account of race." Brief for U.S. as Amicus Curiae, at 2-3. In the instant case, the United States

explained that "the availability of remedies under 42 U.S.C. 1981 for acts of racial discrimination in employment affects the degree of compliance with, and allocation of government resources in enforcing, the proscriptions of Title VII." Brief for U.S. as Amicus Curiae, at 2.[113]

State and local governments also have built upon the rights provided under Runyon and Jones in structuring their own remedies and enforcement activities.[114] Attorneys have relied upon Runyon and Jones in advising clients.

The victims of racial discrimination also have legitimately relied upon the rights provided under Jones and Runyon. The situation of petitioner, Brenda

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[113] The United States also stated: "It is now well-established that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts, including contracts of employment." Id. at 6.

[114] See Brief of New York, 46 Other States, the District of Columbia, Puerto Rico and the Virgin Islands, as Amici Curiae.

Patterson, illustrates the type of detrimental reliance that is likely to have occurred with many victims of racial discrimination. Mrs. Patterson could have brought her racial harassment and promotion discrimination claims against McLean Credit Union under Title VII.[115] She chose to sue under § 1981 and to forego the Title VII claims.[116] Reasonably relying on the availability of a remedy under § 1981, Mrs. Patterson let the short statute of limitations expire on her Title VII claim.[117] If the Court now overrules Runyon, Mrs. Patterson will be left without any remedy for either her harassment claim or her promotion claim.

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[115] Mrs. Patterson filed a timely charge with the EEOC and received a right to sue letter. Record, Exs. 3 and 5 to Defendant's Brief in Support of Motion for Summary Judgment.

[116] Mrs. Patterson would not have been entitled to a jury trial or to compensatory and punitive damages under Title VII. A major element of Mrs. Patterson's claim was discrimination in the terms and conditions of her employment, for which Title VII provides no monetary remedy.

[117] Title VII requires that the recipient of a right to sue letter bring suit within 90 days. 42 U.S.C. § 2000e-5(f)(1) (1982).

The doctrine of stare decisis is in large part a recognition that individuals and institutions reasonably rely on judicial decisions.[118] The reliance of governmental actors and the public is especially justified in the case of the Runyon and Jones decisions. Each of those cases was decided with only two dissenting votes and has been reaffirmed repeatedly, including three unanimous decisions as recently as 1987.

B. Runyon and Jones Resulted From Thorough Analysis.

The doctrine of stare decisis is particularly strong where the precedent at issue resulted from thorough briefing and careful analysis[119] and no new evidence casts doubt on the Court's original conclusion. The Runyon and Jones decisions resulted from a careful, deliberative

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[118] E.g. Oklahoma City v. Tuttle, 471 U.S. at 819 n.5; Thomas v. Washington Gas Light Co., 448 U.S. at 272.

[119] Compare, e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (overruling antitrust precedent where doctrine was never analyzed in depth and was not necessary to result).

process. Those who disagree with the Court's reading of that history do not believe that Runyon or Jones was clearly wrong.[120] Justice White's reasoning in Patsy with regard to the exhaustion requirement under § 1983, applies equally well to the current situation:

> For nearly 20 years and on at least 10 occasions the Court has clearly held that [§§ 1981 and 1982 prohibit private discrimination]. Whether or not this initially was a wise choice, these decisions are stare decisis, and in a statutory case, a particularly strong showing is required that we have misread the relevant statute and its history.

457 U.S. at 517 (concurring opinion).

C. No "Special Justification" Exists For Overruling Runyon or Jones.

Because of the strong societal interests in the doctrine of stare decisis, there is a "presumption of adherence to ... prior decisions construing legislative

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[120] Jones, 392 U.S. at 450 (Harlan, J., joined by White, J., dissenting) (Court's construction "at least is open to serious doubt"), 452-453 ("there is an inherent ambiguity in the term 'right' as used in § 1982"), 454 ("debates do not ... overwhelmingly support the result reached by the Court, and ... a contrary conclusion may equally well be drawn").

enactments." Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). Even in the constitutional context, the overruling of a precedent is an "exceptional action," which must be supported by "special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). No special justification exists to overcome this presumption with respect to Runyon or Jones.

The Court has identified several factors that may in some combination outweigh the interests of stare decisis.[121] A very important countervailing consideration is whether the precedent under review has proved unworkable or has caused significant harm in its application. In making the determination of workability or harm, the Court generally looks to the experience in applying the decision at issue. Criticism of the precedent

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[121] Counsel for petitioner have located 39 cases in which the Court has overturned a statutory precedent. These cases are listed in Appendix C. In 33 of these 39 cases, the Court explicitly relied upon either the harm of the prior decision (13 cases) or a subsequent change in the law (20 cases).

by lower courts or commentators also is relevant to this determination.[122] For example, in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47 (1977), the Court overruled United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967), because "[s]ince its announcement, Schwinn had been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts."[123]

Far from causing great harm in application, the Runyon and Jones rulings have produced tremendous benefits. As interpreted in Runyon and Jones, §§ 1981

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[122] E.g. Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S. Ct. 1133, 1140, 1142 & n.10 (1988) (overruling procedural doctrine based on "[a] half century's experience," which demonstrated that the doctrine was "unworkable," "arbitrary," produced "bizarre outcomes," had been "repeatedly ... lambasted" by the lower federal courts, and had been subjected to "scathing" criticism by commentators).

[123] Similarly, in the constitutional context, the Court overturned part of its decision in Swain v. Alabama, 380 U.S. 202 (1965), because the experience since Swain showed that the rule resulted in placing "on defendants a crippling burden of proof," and making "prosecutors' peremptory challenges ... largely immune from constitutional scrutiny." Batson v. Kentucky, 476 U.S. 79, 92-93 (1986). See also id. at 101 (White, J., concurring) (experience under Swain showed that discriminatory use of peremptory challenges "remains widespread").

and 1982 have played a vital role in the national effort to eliminate intentional racial discrimination. Sections 1981 and 1982 provide a remedy for discriminatory conduct in many situations where no other federal statute operates. For example, § 1981 has played a critical role in preventing discrimination by private schools.[124] Such discrimination "is contrary to fundamental public policy." Bob Jones, 461 U.S. at 592. Private schools which receive no federal funds are subject to no other federal anti-discrimination statute. The application of § 1981 to

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[124] See e.g., Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (white student expelled for talking to black students); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (refusal to admit black students); Riley v. Adirondack Southern School for Girls, 541 F.2d 1124 (5th Cir. 1976) (refusal to admit black student). See also Albert v. Carovano, 824 F.2d 1333 (2d Cir. 1987) (unequal discipline by private college); Goinz v. Specialized Skills, 326 F. Supp. 856 (W.D.N.C. 1971) (barber school).

In addition to the cases actually litigated under § 1981, other private schools have voluntarily modified their policies in light of Runyon. For example, following the Fourth Circuit's ruling in Runyon, 515 F.2d 1082 (1975), Bob Jones University revised its policy and permitted unmarried blacks to enroll. Bob Jones, 461 U.S. at 580. In the absence of coverage under § 1981, many private schools are likely to revert to their prior racially exclusionary policies.

private schools is essential not only to guarantee equal access to the educational opportunities provided by such schools, but also to prevent private segregation academies from undermining the desegregation process in the public schools.[125]

Sections 1981 and 1982 also provide a cause of action for intentional discrimination by insurance companies,[126] commercial day care centers,[127] private cemeteries and mortuaries,[128] contractors and franchisers,[129] certain private clubs,[130] private

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[125] See Brief for United States as Amicus Curiae, Runyon v. McCrary, at 2-3. See also Norwood v. Harrison, 413 U.S. 455, 457, 467 & n.9 (1973).

[126] Sims v. Order of United Commercial Travelers, 343 F. Supp. 112 (D. Mass. 1972); Ortega v. Merit Insurance Co., 433 F. Supp. 135 (N.D. Ill. 1977).

[127] Darensburg v. Dufrene, 460 F. Supp. 662 (E.D. La. 1978).

[128] Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975); Terry v. Elmwood Cemetery, 307 F. Supp. 369 (N.D. Ala. 1969).

[129] Sud v. Import Motors Limited, Inc., 379 F. Supp. 1064 (W. D. Mich. 1974).

homeowners[131] and employers with fewer than 15 employees.[132] No other federal statute provides a cause of action to combat these types of private, non-federally-funded invidious racial discrimination.

Additionally, §§ 1981 and 1982 afford an important remedy against third-party interference with the enjoyment of contract or property rights.[133] For example, § 1981 was held to prohibit Ku Klux Klan use of

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[130](...continued)
[130] Tillman v. Wheaton-Haven; Sullivan v. Little Hunting Park; Wright v. Salisbury Club, Ltd., 632 F.2d 309 (4th Cir. 1980); Johnson v. Bruce, 472 F. Supp. 1056 (E.D. Ark. 1979); Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182 (D. Conn. 1974).

[131] The Fair Housing Act exempts from coverage certain sales or rentals of single family homes by an owner and certain rooms or units in dwellings occupied by the owner and by four or fewer families. 42 U.S.C. § 3603(b). See Johnson v. Zaremba, 381 F. Supp. 165 (N.D. Ill. 1973) (applying § 1982 to owner-occupied dwelling with less than four units).

[132] Title VII exempts from coverage employers with fewer than 15 employees. 42 U.S.C. § 2000e-1(b).

[133] Protection against this type of discrimination was one of Congress' concerns when it enacted § 1 of the Civil Rights Act of 1866, see Part II above, and was one of the reasons that Congress rejected proposals to repeal §§ 1982 and 1982, see 118 Cong. Rec. at 3062 (Sen. Javits).

intimidation tactics, such as cross-burning, for the purpose of discouraging Vietnamese fishermen from contracting with dock owners. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (S.D. Texas 1981). Similarly, a black former student at the Citadel is suing white students for harassment and intimidation because of his race. Second Amended Complaint ¶ 22, Nesmith v. Grimsley, No. 2-86-3248-8 (D.S.C.).[134] And, pursuant to the Court's 1987 decision in Shaare Tefila, § 1982 is being used to remedy race-based desecration of a synagogue.

In addition to filling in gaps in the coverage of federal anti-discrimination statutes, §§ 1981 and 1982 provide important supplemental procedures and remedies in areas where other federal statutes operate. A trial by

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[134] This harassment, which interfered with the black student's right to enjoy the benefits of his contract for a college education, included an incident in which five white students "entered [his dormitory] room dressed in sheets and towels resembling Ku Klux Klan attire, chanted threatening remarks ... and left behind a burned paper cross." Id. at ¶ 18.

jury is guaranteed in actions for legal damages under §§ 1981 and 1982. In contrast, a jury trial is not available under Title VII. Full legal remedies, including compensatory and, in appropriate cases, punitive damages, may be awarded for violations of §§ 1981 and 1982. Title VII monetary relief is limited to backpay, and punitive damages under the Fair Housing Act are limited to $1,000. The availability of compensatory and punitive damages is especially important in cases of racial harassment, where the plaintiff may not have suffered any loss of wages and would be entitled to no monetary remedy under Title VII.

The fact that multiple remedies with differing procedures are available in some situations to redress racial discrimination is itself a positive benefit, as has been recognized by the Court, Congress and the Executive Branch. Moreover, the existence of multiple

remedies has not produced problems of workability.[135] Instead, the federal courts have, for almost twenty years, routinely applied §§ 1981 and 1982 to allegations of private discrimination, without fanfare or complaint. The major substantive[136] and procedural[137] questions now have been settled by definitive rulings from this Court or by a consensus among the lower courts.[138] The federal agencies charged with enforcement of statutes that

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[135] Senator Hruska argued in 1972 that the existence of multiple remedies would harm employers. Senator Javits responded that these theoretical problems had not occurred in actual experience, 118 Cong. Rec. at 3370, and Congress rejected the Hruska amendment.

[136] E.g. General Building Contractors v. Pennsylvania, 458 U.S. at 391 (intentional discrimination required); Saint Francis College v. Al-Khazraji, 107 S. Ct. at 2022 (discrimination on basis of ancestry covered); McDonald v. Santa Fe, 427 U.S. at 280 (discrimination against whites covered).

[137] E.g. Goodman v. Lukens Steel Co., 107 S. Ct. at 2021 (statute of limitations); Johnson v. Railway Express Agency, 421 U.S. at 461, 463-464 (no tolling; compensatory and punitive damages available).

[138] The lower courts have used the rules of proof of intentional discrimination developed under the Constitution and other federal statutes. E.g. Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980) (elements of violation are identical under § 1981, § 1983 and Title VII disparate treatment claim).

overlap with §§ 1981 and 1982 have consistently maintained that the Reconstruction Era remedies complement the governmental procedures.[139]

The availability of a cause of action under §§ 1981 and 1982 for racial harassment or discrimination in the terms and conditions of performance of a contract also creates no workability problems. Such causes of action have been routinely handled by the federal courts under §§ 1981 and 1982 at least since 1969,[140] and have been

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[139] See, e.g. United States v. Medical Society of South Carolina, 298 F. Supp. 145 (D.S.C. 1969) (Attorney General lawsuit enforcing, inter alia, § 1981); Brief of the Equal Employment Opportunity Commission as Amicus Curiae, Keller v. Prince Georges Co., 827 F.2d 952 (4th Cir. 1987) (Title VII did not preempt Reconstruction Era remedies).

[140] E.g. United States v. Medical Society of South Carolina, 298 F. Supp. at 148-149 (racially segregated waiting rooms in private hospital); Bourdreaux v. Baton Rouge Marine Contracting Co., 437 F.2d at 1016 (racial discrimination in job assignments); Young v. I.T.&T., 438 F.2d at 757 (racial harassment in employment); Clark v. Universal Builders, Inc., 409 F. Supp. 1274 (N.D. Ill. 1976) (racially discriminatory prices and terms in home sales). See also cases cited in Brief for Petitioner at 35 nn. 12 & 13.

recognized for many years under Title VII.[141]

Another factor that can constitute a countervailing force to the doctrine of stare decisis is an intervening change in the law, either through legislation or subsequent court decisions. No such change has occurred with respect to Runyon and Jones. As discussed above, subsequent legislative developments strongly support continued adherence to Runyon and Jones.

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[141] See, e.g. Meritor Savings Bank v. Vinson, 91 L. Ed. 2d 49 (1986) (sexual harassment actionable under Title VII; relies on racial harassment cases in lower courts); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (racially offensive work environment); Firefighters Institute v. City of St. Louis, 549 F.2d 506, 514-515 (8th Cir.), cert. denied sub nom. Banta v. United States, 434 U.S. 819 (1977) (racially discriminatory supper clubs on employer's premises violates Title VII).

Conclusion

For the reasons stated, the Court should reaffirm the holding in Runyon that § 1981 prohibits wholly private, contractual discrimination on the basis of race.

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APPENDICES

APPENDIX A

Newspaper Articles Concerning The Application of 1866 Civil Rights Act to Private Contacts

(1) Washington Intelligencer, March 24, 1866

"The 'Civil Rights' Bill"

* * *

"2. It establishes negro superiority." . . . It would be an offense to recognize in state law, or even in private contract, a distinction of color or race 'under color of any custom'. This is, we believe, an unprecedented provision. It carries Federal interference into privacies into which the most local and domestic laws never intrude. It might -- nay, does -- daily happen, that bargains are made between whites and colored men which are indispensable to the well-being of the latter, yet which would be unintelligible without recourse to the custom of

distinguishing on account of race or color -- an observance of which is made penal by this statute. . . . Let us consider how this provision would operate. For example, at a public sale of pews in a church, a negro or a Chinaman born in this country might offer the highest bid. The custom of the church might be against selling to one of either race or color, and if the bidder should bring an action in the state court, there is no doubt he would fail to establish a right to the pew. But here is a right withheld on account of race or color . . . . [A] negro, though an infidel, could enforce his right as the highest bidder, in spite of the Congregation, the courts, the people, and the whole state itself. . . .

"Again: at hotels, what landlord would venture upon enforcing the customs of his hotel

against negroes? . . . . [I]f the wrong be done to a negro, however bestial or ignoble, the excuse that it was done under color of custom would aggravate the offense; and the greatest military power on earth could be invoked for the punishment of a publican. . . ."

(2) Cincinnati Commercial, March 30, 1866

"The Civil Rights Bill"

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"Politicians must admit that there still exists, in some quarters, among white folks, a prejudice against the colored people. This may be a mean thing to appeal to, and [we] wouldn't appeal to it, but we mention the fact. The prejudice of which we speak is developed in objections to allowing negroes to own pews in the churches, or to seating themselves without consulting the color of their neighbors, in

churches, concert halls or theaters, in the dining-rooms of hotels, and elsewhere in the congregation of the people.

"Colored schools are established, and there are persons, who are not traitors, who think it would not be well to mix the white and black children in the same school rooms. We do not know that either would be hurt by the process, but the prejudice against such a mixture is, perhaps, pretty strong. How many wards of Cincinnati, for instance, would cast large majorities for the re-election of General HAYES and BENJAMIN EGGLESTON to Congress, upon the ground that they had assisted in passing over the President's veto a measure that opened the schools where the white children are being educated to the blacks, and not only opened the schools but the churches, theaters and hotels,

making all distinctions against any color any where, according to the established customs of our society, a crime, punished with severe penalties?"

(3) Indianapolis Daily Herald, April 17, 1866 (p. 2, col. 1)

"The Negro Rights Act"

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"No one can read these provisions of the law, and doubt that its design and purpose, so far as legislation can accomplish it, is to make the negroes fully equal to the white citizens. And what will be its practical effect? . . . [D]oes it not [make] the negro [on an equal footing] in all respects? Under the act can the proprietors of a hotel, of a place of amusement, of a railroad, make any distinction on account of color or race? If a negro should go to the

Palmer House and thrust himself upon the guests in the dining room, would not the proprietor subject himself, under the new law, to damages, if he should forcibly eject him from the premises, or refuse to allow him the same privileges as other guests? Could not a negro, if refused an unoccupied seat at any place of amusement, subject the proprietor to damages for the assault upon his dignity and rights? If there should be a public letting of pews at any of our churches, would not the negro have the right to have his bid respected, if it should be the highest? And could a negro be ejected from any unoccupied seat in a railroad car?

"During the canvass preceeding the last two presidential elections, the Republicans denied most stoutly and indignantly that they tolerated any such idea as negro equality. But

what is the result? A law . . . to break down all distinctions between races and color . . . .

"We regard this attempt by legislation to lift the negro to the same level with the white race, to overcome the prejudices of color and race by legal enactments, as unwise and detrimental to the best interests of the blacks. The antagonism of the races, which is deep seated, will only be developed and intensified by such laws . . . . But such is Republicanism."

APPENDIX B

Lower Court Cases Applying §§ 1981 and 1982 to Private Discrimination: 1968-1972

1968: Newburn v. Lake Lorelei, Inc., 308 F. Supp 407 (S.D. Ohio) (lot in housing development).

1969: Scott v. Young, 307 F. Supp. 1005 (E. D. Va.), aff'd. 421 F.2d 143 (4th Cir.), cert. denied. 398 U.S. 929 (1970) (amusement park admissions policy); Terry v. Elmwood Cemetery, 307 F. Supp. 369 (N.D. Ala. 1969) (burial plots in private cemetery); United States v. Medical Society of South Carolina, 298 F. Supp. 145 (D.S.C.) (discrimination in hospital admissions; segregation of patients).

1970: Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (private employment discrimination); Sanders v. Dobbs House, 431 F.2d 1097 (5th Cir.), cert. denied, 401 U.S. 948 (1971) (employment).

1971: Young v. I.T.&T., 438 F.2d 757 (3d Cir.) (employment); Caldwell v. The National Brewing Co., 443 F.2d 1044 (5th Cir.) (employment); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir.) (employment); Grier v. Specialized Skills, 326 F. Supp. 856 (W.D.N.C.) (admission to professional barber school; refusal to serve black customers).

1972: Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir.) (employment); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.) (employment); Sims v. Order of United Commercial Travelers, 343 F. Supp. 112 (D. Mass.) (insurance).

APPENDIX C

STATUTORY PRECEDENTS OVERRULED[1]

Statutory Precedent Overruled Because of Harm or Unworkability

1. Gulfstream Aerospace Corp. v. Mayacamas, 108 S. Ct. 1133, 1140 (1988), overruling Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942) and Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935) ("A half century's experience has persuaded us ... that the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals").

2. United States v. Ross, 456 U.S. 798, 803 (1982), overruling Robbins v. California, 453 U.S. 420 (1981) (lower courts were divided and confused on the meaning of the Court's decisions and "[t]here is ... no dispute among judges about the importance of striving for clarification in this area of the law"); id. at 825 (Blackmun, J., concurring); id. at 826

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[1] The cases included in Appendix C are those identified by counsel for petitioner as involving a statutory precedent from the list of overruled cases in The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 99-16, 99th Cong., 1st Sess. 2117-2127 (J. Killian ed. & L. Beck assoc. ed. 1987) and S. Doc. No. 100-9, 100th Cong., 1st Sess. 143 (Supp. 1987), as well as cases in which a statutory precedent was overruled after the date of the 1987 Supplement. Cases in which a prior decision was overturned on rehearing of the same case are omitted.

(Powell, J., concurring).

3. Continental v. GTE Sylvania, 433 U.S. 36, 47 (1977), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) ("Schwinn has been the subject of continuing controversy and confusion").

4. Boys Markets v. Retail Clerks Union, 398 U.S. 235, 241 (1970), overruling Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) ("it has become clear that the Sinclair decision does not further but rather frustrates realization of an important goal of our national labor policy").

5. Lee v. Florida, 392 U.S. 378, 385-386 (1968), overruling Schwartz v. Texas, 344 U.S. 199 (1952) (decision based on changes in federal constitutional law and "counseled by experience" showing that the prior decision was ineffective).

6. Peyton v. Rowe, 391 U.S. 54, 61-62 (1968), overruling McNally v. Hill, 293 U.S. 131 (1934) (the "harshness of [the McNally rule] becomes obvious when applied to the cases of Rowe and Thacker" and demonstrates that the rule "can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice").

7. Swift & Co. v. Wickham, 382 U.S. 111, 116, 124-25 (1965), overruling Kesler v. Department of Public Safety, 369 U.S. 153 (1962) (prior interpretation of three-judge court statute

"proved to be unworkable in practice," produced "mischievous consequences," created "uncertainty" and difficulties in application by the lower courts and was "uniformly criticized by commentators").

8. Fay v. Noia, 372 U.S. 391, 435, 437 (1963), overruling Darr v. Burford, 339 U.S. 200 (1950) ("the expectation [of the prior ruling] has not been realized in experience" and instead the rule "has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims" that has "impeded" the "goal of prompt and fair criminal justice" and "unwarrantably taxed the resources of this Court").

9. James v. United States, 366 U.S. 213, 221 (1961), overruling Commissioner v. Wilcox, 327 U.S. 404 (1946) (tax law precedent had caused "confusion" in the lower courts and had resulted in "injustice").

10. Brady v. Roosevelt Steamship Co., 317 U.S. 575, 578, 581 (1943), overruling Johnson v. Fleet Corp., 280 U.S. 320 (1930) (prior ruling had resulted in "a substantial dilution of the rights of claimants").

11. Helvering v. Hallock, 309 U.S. 106, 110 (1940), overruling Helvering v. St. Louis Trust Co., 296 U.S. 39 (1935) and Becker v. St. Louis Trust Co., 296 U.S. 48 (1935) (relying on "difficulties which the lower courts have found in applying the distinctions made by these cases and the seeming disharmony of their results").

12. Lee v. Chesapeake & Ohio Railway Co., 260 U.S. 653, 659 (1923), overruling Ex parte Wisner, 203 U.S. 449 (1906) ("Much that was said in the opinion [Wisner] was soon disapproved in In re Moore, 209U.S. 490, where the Court returned to its former rulings ..." and "it has been a source of embarrassment and confusion in other courts").

13. Gazzam v. Phillip's Lessee, 20 How. (61 U.S.) 372, 377-378 (1858), overruling Brown's Lessee v. Clements, 3 How. (44 U.S.) 649 (1845) (adherence to Brown principle "in its practical operation will unsettle the surveys and sub-divisions of fractional sections of the public land" and result in "disturbance and confusion").

Statutory Precedent Overruled
Because of Change in Law

1. Monell v. New York City Department of Social Services, 436 U.S. 658, 696 (1978), overruling in part Monroe v. Pape, 365 U.S. 167 (1961) (Monroe holding was inconsistent with prior decisions and with subsequent practice).

2. Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 153 (1976), overruling International Union v. Wisconsin Employment Relations Board (Briggs-Stratton), 336 U.S. 245 (1948) (later decisions made clear that labor law precedent was "inconsistent with the federal regulatory

scheme").

3. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 497 (1973), overruling Ahrens v. Clark, 335 U.S. 188 (1948) ("developments since Ahrens have had a profound impact on the continuing vitality of that decision").

4. Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 322 (1972), overruling Moore v. Illinois Central Railroad Co., 312 U.S. 630 (1941) ("Later cases from this Court have repudiated the reasoning advanced in support of the results reached in Moore....").

5. Griffin v. Breckenridge, 403 U.S 88, 96 (1971), overruling in part Collins v. Hardyman, 341 U.S. 651 (1951) (relying on "evolution of decisional law").

6. Smith v. Evening News Ass'n, 371 U.S. 195, 199 (1962), overruling in part Employees v. Westinghouse Corp., 348 U.S. 437 (1955) ("subsequent decisions ... have removed the underpinnings of Westinghouse and its holding is no longer authoritative as a precedent").

7. Construction Laborers v. Curry, 371 U.S. 542, 552, overruling in part Building Union v. Ledbetter Co., 344 U.S. 178 (1952) (relying on changes in the law concerning pre-emption and jurisdiction of NLRB).

8. Cosmopolitan Co. v. McAllister, 337 U.S. 783, 793 (1949), overruling Hust v. Moore-

McCormack Lines, 328 U.S. 707 (1946) ("[t]he Caldarola case ... undermined the foundations of Hust").

9. Comm'r v. Estate of Church, 335 U.S. 632, 636-637 (1949), overruling May v. Heiner, 281 U.S. 238 (1930) (citing "confusion and doubt as to the effect of our Hallock case on May v. Heiner" and holding "that the Hallock and May v. Heiner holdings and opinions are irreconcilable").

10. Angel v. Bullington, 330 U.S. 183, 192 (1947) overruling David Lupton's Sons v. Automobile Club of America, 225 U.S. 489 (1912) (a subsequent case "drastically limited the power of federal district courts to entertain suits in diversity").

11. Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 668 n.1 (1944), overruling Leeds & Catlin Co. v. Victor Talk Mach. (No. 2), 213 U.S. 325 (1909) (relying upon subsequent doctrinal developments and fact that crucial point had been only "adverted to in the briefs" in initial case).

12. FPC v. Hope Gas Co., 320 U.S. 591, 606-607 (1944), overruling United Railways v. West, 280 U.S. 234 (1930) (subsequent decisions eroded precedent).

13. Oklahoma Tax Comm'n. v. United States, 319 U.S. 598, 602-605 (1943), overruling Childers v. Beaver, 270 U.S. 555 (1926) (change in law and in status of Indian tribes).

14. Rochester Tel. Corp. v. United States, 307 U.S. 125, 136 & n.13, 140-143 (1939), overruling Procter & Gamble v. United States, 225 U.S. 282 (1912) (subsequent decisions eroded doctrine of prior case).

15. Fox Film Corp. v. Doyal, 286 U.S. 123, 129-130 (1932), overruling Long v. Rockwood, 277 U.S. 142 (1928) (subsequent decisions and inconsistent authorities);

16. Chicago & E.I.R. Co. v. Commission, 284 U.S. 296, 299 (1932), overruling Erie R.R. Co. v. Collins, 253 U.S. 77 (1920) and Erie R. R. Co. v. Szary, 253 U.S. 86 (1920) (irreconcilable authorities).

17. Boston Store v. American Graphophone Co., 246 U.S. 8, 25 (1918) and Motion Picture Co. v. Universal Film Co., 243 U.S. 502, 518 (1917), overruling Henry v. Dick Co., 224 U.S. 1 (1912) (conflicting doctrines).

18. Rosen v. United States, 245 U.S. 467, 470 (1918), overruling United States v. Reid, 12 How. (53 U.S.) 361 (1851) (authority of Reid "seriously shaken" by subsequent decisions).

19. Kountze v. Omaha Hotel Co., 107 U.S. 378, 387 (1883), overruling Stafford v. The Union Bank of Louisiana, 16 How. (57 U.S. 135 (1853) ("[s]ubsequent decisions have undoubtedly modified the rule followed in [Stafford] and, indeed, have overruled it").

20. Gordon v. Ogden, 3 Pet. (28 U.S.) 33, 34

(1830), overruling Wilson v. Daniel, 3 Dall. (3 U.S.) 401 (1798) ("contrary practice [has] since prevailed").

Statutory Precedent Overruled Where Neither Harm Nor Change in Law or Circumstances Explicitly Given as Reason

1. Copperweld Corp. v. Independence Tube Co., 467 U.S. 752, 760, 766 (1984), overruling United States v. Yellow Cab Co., 332 U.S. 218 (1947) (doctrine had never been analyzed in depth and was unnecessary to result in prior cases).
2. Girouard v. United States, 328 U.S. 61, 64 (1946), overruling United States v. Macintosh, 283 U.S. 605 (1931).

3. Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 139 (1941), overruling Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) ("Loose language and a sporadic, ill-considered decision").

4. Nye v. United States, 313 U.S. 33, 51 (1941), overruling Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

5. United States v. Phelps, 107 U.S. 320, 323 (1883), overruling Shelton v. The Collector, 5 Wall (72 U.S.) 113 (1867).

6. Hornbuckle v. Toombs, 85 U.S. 648, 653, 656-657 (1873), overruling Noonan v. Lee, 2 Bl. (67 U.S.) 499 (1863) and Orchard v. Hughes, 1 Wall. (68 U.S.) 73, 77 (1864) and Dunphy v. Kleinsmith, 11 Wall. (78 U.S.) 610 (1871).